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THE USE OF DIFFERENT MEANS OF PROOFS IN MARRIAGE NULLITY CASES ON THE GROUND OF *DOLUS* (*CCEO* c. 821 AND *CIC* c. 1098)

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Marriage nullity trials do not concern a right of one party and the corresponding obligation of another, but rather the confirmation of a juridic act which must have both substantial and formal elements for them to be valid. Matrimonial trials serve to ascertain whether factors invalidated a marriage according to natural, divine or ecclesiastical law. To establish the alleged non-existence of a marriage bond, proofs are essential. This paper tries to analyze various means of proofs and the constitutive elements of *dolus* as a ground of marriage nullity.

Introduction

Whenever the rights of a member of the Christian faithful become an object of controversy, the member has the right to have the matter resolved in accordance with the law[1]. According to *CCEO* c. 24 (*CIC* c. 221), the Christian faithful can legitimately vindicate and defend the rights in the Church according to the norms of the law and when they are summoned to a trial by a competent authority, they have the right to be judged according to the prescripts of the law. Therefore, individuals who think that their marriage is invalid can introduce a case alleging this before a competent tribunal[2] in accordance with the

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[1]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, Washington DC, Canon Law Society of America, 2002, 147.

[2]*CCEO* c. 1358, as revised by the motu proprio *Mitis et misericors Iesus* (CIC c. 1672 as revised by *Mitis Iudex Dominus Iesus*) "In cases regarding the nullity of marriage not reserved to the Apostolic See, the competencies are: 1º the tribunal of the place in which the marriage was celebrated; 2º the tribunal of

norms of the Code. However, Pope St John Paul II reminded us, "it must be remembered that the spouses, who in any case have the right to allege the nullity of their marriage, do not, however have either the right to its nullity or the right to its validity. In fact, it is not a question of conducting a process to be definitively resolved in a constitutive sentence, but rather of the juridical ability to submit the question of the nullity of one's marriage to the competent Church authority and to request a decision in the matter"[3].

Marriage nullity trials do not concern a right of one party and the corresponding obligation of another, but rather the confirmation of a juridic act which must have both substantial and formal elements for them to be valid. Therefore, matrimonial trials serve to ascertain whether factors invalidated a marriage according to natural, divine or ecclesiastical law, in order to issue a correct and just sentence regarding the alleged non-existence of the marriage bond[4]. To arrive at this sentence with moral certainty, a judge must evaluate the proofs produced in a given case.

1. The Means of Proofs in Marriage Nullity Cases

Proofs, which demonstrate the certainty of a fact or truth of an affirmation, are essential to the marriage nullity process. Based on the proofs produced, the judge arrives at moral certitude and pronounces a sentence on the case under consideration. The general principles regarding proofs are contained in *CCEO* cc. 1207-1210 (*CIC* cc. 1526-1529). From these canons, it is evident that a simple affirmation or mere allegation does not constitute a valid proof. As a result, a person who alleges the nullity of his/her marriage is obliged to provide

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the place in which either or both parties have domicile or a quasi-domicile; 3º the tribunal of the place in which in fact most of the proofs must be collected". Francis, MP *Mitis et misericors Iesus*, *AAS* 107 (2015), 946-957. Hereafter, the abbreviation of the *motu propio Mitis et misericors Iesus* will be MEMI.

[3]John Paul II, *Allocution to the Roman Rota*, 22 January 1996, *AAS* 88 (1996), 773-777; English translation in William H. Woestmann, (ed.), *Papal Allocutions to the Roman Rota*, 1939-2011, Ottawa, Saint Paul University, 2011, 238.

[4]John Paul II, *Allocution to the Roman Rota*, 4 February 1980, *AAS* 72 (1980), 172-178; English translation in William H. Woestmann, (ed.), *Papal Allocutions to the Roman Rota*, 1939-2011, Ottawa, Saint Paul University, 2011, 160.

sufficient proof to overturn the presumption of law in favour of validity[5].

In certain cases, the law does not require proof of an affirmation. These include "facts alleged by one of the contending parties and admitted by the other, unless the law or the judge nevertheless requires proof" (*CCEO* c. 1207 §2, 2º and *CIC* c. 1526 §2, 2º). In marriage nullity cases, parties commonly agree on certain facts. Nevertheless, this agreement does not conclusively demonstrate invalidity[6]. Solid proofs must corroborate whatever suggestions of nullity the agreement provides.

Any useful and licit proof can be introduced in marriage nullity cases[7]. However, a judge is not obliged to collect all proofs the parties deem pertinent. For example, a judge may reject witness testimony when he judges the number of witnesses excessive. Parties may insist that certain proofs be admitted; however, it still belongs to the judge to decide whether to do so (*CCEO* c. 1208 §2 and *CIC* c. 1527 §2). Ultimately, he or she decides whether any given proof is useful and relevant.

The codes of canon law list of five major sources of evidence: 1) the declaration of the parties; 2) documents; 3) witnesses and testimonies; 4) experts; 5) presumptions. Naturally, all these means of proof have a great role to play in dealing with marriage cases based on *dolus*.

1.1 Declarations of the Parties

In marriage nullity cases, the parties are the prime source of information regarding their marital consent. Therefore, their declarations have first place among the proofs available to the judge[8].

As a rule, the law gives the judge the faculty to interview the parties. According to *CCEO* c. 1211 (*CIC* c. 1530), "the judge can always

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[5]*CCEO* c. 779 (*CIC* c. 1060) states: "Marriage enjoys the favour of the law; consequently, in doubt, the validity of a marriage is to be upheld until the contrary is proven".

[6]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 153.

[7]*CCEO* c. 1208 §1 (*CIC* c. 1527 §1) says: "Proofs of any kind that seem useful for adjudicating the case and that are licit can be adduced".

[8]Piero Antoio Bonnet has produced a comprehensive study of the probative value of the parties' declarations. Piero Antonio Bonnet, "Le dicharazioni delle parti, I", *Periodica* 103 (2014), 491-524; Piero Antonio Bonnet, "Le dicharazioni delle parti, II", *Periodica* 103 (2014), 595-628; Piero Antonio Bonnet, "Le dicharazioni delle parti, III", *Periodica* 104 (2015), 23-64.

question the parties to elicit the truth more effectively and indeed must do so at the request of a party or to prove a fact that the public interest requires to be placed beyond doubt". When lawfully questioned, the parties must provide an entirely truthful answer. If one refuses to respond, the judge must evaluate the significance of the refusal in connection with the facts to be established (*CCEO* c. 1212 and *CIC* c. 1531).

In marriage cases and other cases where the public good is at stake, parties must swear an oath either to tell the truth or at least to confirm the truth of what they have said (*CCEO* c. 1213 and *CIC* c. 1532). Evidence given or confirmed under oath can be a useful indication of truthfulness[9].

A judicial confession[10] by one of the parties is of great importance in a judicial process. *CCEO* c. 1216 (*CIC* c. 1535) defines this confession,

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[9]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 154.

[10]There is a difference between judicial declarations and judicial confessions. According to Arroba Conde, "Si chiamano dichiarazioni giudiciali quelle risposte date dalla parte durante l'interrogatorio, che hanno contenuto favorevole alla propria posizione processuale. Si tratta quelle risposte mediante le quali la parte espone la propria versione dei fatti quale supporto della propria pretesa o contraddizione". Manuel J. Arroba Conde, *Diritto processuale canonico*, Roma, Ediurcla, 2006, 425. In the collection of proofs, these judicial confessions and declarations have great importance because they are the primary source of information regarding the marriage case. In addition, judicial deposition is the most effective means of obtaining reliable deposition in searching out the truth. Raymond Burke speaks of the so-called "best practices" in collecting proofs from parties and witnesses. He describes what is this "best practice": "in the realm of canonical procedural law, the 'best practice' for the objective collection of proofs from parties and witnesses is precisely the judicial deposition. This means the deposition of the person using questions based on the specific ground or grounds of nullity determined in the formulation of the doubt. The questions are prepared by the judge, with input from the parties and the defender of the bond, but previously unseen by the deponent, and then answered by the party or witness in the presence of a notary". Raymond L. Burke, "The Nullity of Marriage Process as the Search for Truth", *Monitor Ecclesiasticus* 129 (2014), 146; Miguel A. Ortiz, "Le dichiarazioni delle parti e la certezza morale", *Ius Ecclesiae* 18 (2006), 387-416. The *jurata confessio conjugum* is the chief and fundamental proof upon which the process rest, all other proofs, being only confirmatory or corroborative in character, designed to support the allegations of the parties concerned. Hence, utmost care should be taken to

considered the best or "queen" of proofs,[11] as follows: " the written or oral assertion of some fact made against oneself before a competent judge by any party concerning the matter of the trial, whether made voluntarily or while being questioned by the judge".

In private matters, such as the ownership of some object or right, the confession of one party relieves the other parties from the burden of proof.[12] However, the law attributes a different probative value in marriage and other cases involving the public good. For these cases, as *CCEO* c. 1217 §2 (*CIC* c. 1536 §2) states, "a judicial confession and other declaration of the parties can have a probative force that the judge must evaluate together with the other circumstances of the case, but full probative force cannot be attributed to them unless other elements are present that thoroughly corroborate them".

In 2015, the motu proprii *Mitis Iudex Dominus Iesus* and *Mitis et misericors Iesus* altered the probative value of declarations of the parties in marriage nullity cases. In order to achieve justice when witnesses are scarce,[13] *CCEO* c. 1364 §1 (*CIC* c. 1678 §1[14]) was revised to read: "In cases of the nullity of marriage, a judicial confession and the declarations of the parties, possibly supported by the witnesses to the credibility of the parties, can have the force of full proof, to be evaluated by the judge after he has considered all the indications and supporting factors, unless other elements are present which weaken them".

This revised canon inverts the probative weight traditionally attributed to the judicial confessions and declarations of the parties[15].

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make this testimony clear, definite and complete.William J. Doheny, *Canonical Procedure in Matrimonial Cases*, Vol. II, Milwaukee, The Bruce Publishing Company, 1948, 346.

[11]Peter O. Akpoghiran, *Proofs in Marriage Nullity Process*, Virginia, Ugbugbu Heritage, 2011, 26.

[12]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 155.

[13]Paul Robbins, "*Mitis Iudex Dominus Iesus*: Some Personal Reflections and Practical Applications", *The Canon Law Society of Great Britain and Ireland* 184 (2015), 85.

[14]Francis, MP *Mitis Iudex Dominus Iesus*, *AAS* 107 (2015), 958-970. Hereafter, the abbreviation of *Mitis Iudex Dominus Iesus* will be *MIDI*.

[15]Previous legislation viewed spouses' testimony suspiciously (*CIC* 1917 and MP *Sollicitudinem nostram*). *CIC* 1917 c. 1751 and SN c. 273 were silent on the probative value of the parties' confessions. However, the jurisprudence of

Previously, the depositions of the parties provided full proof[16] only when fully corroborated by other evidence. Now, the depositions themselves can provide full proof[17]. The new law asserts merely that they are capable of doing so unless other elements weaken them[18].

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the Roman Rota slowly eroded this position and the new Codes (*CIC* and *CCEO*) more positively regard the spouses' depositions. Thus, *CIC* c. 1536 §2 (*CCEO* c. 1217 §2) established that the depositions of the parties can serve as partial proof. Regarding judicial confessions and declarations of the parties in marriage nullity cases, *CCEO* c. 1365 (*CIC* c. 1679) stated: "Unless there are full proofs from elsewhere, in order to evaluate the declarations of the parties mentioned in c. 1217 §2, the judge, if possible, is to use witnesses to the credibility of those parties in addition to other indications and supporting factors". Raymond Burke holds that the reason for limiting the probative value of the parties' judicial confessions and declarations is that "non si può neanche negare che non tutte le parti nelle cause matrimoniali dimostrano sempre il dovuto rispetto per la verità ricercata nel processo canonico". He continues, "in ogni caso, l'oggettività nella valutazione giudiziale di una tale prova è sempre salvaguardata dalle condizioni imposte dalla legge, cioè: 1) chi si deve ponderare la dichiarazione insieme con le altre circostanze della causa; e 2) che non si può attribuire forza di piena prova a tale dichiarazione se non insieme ad altri elementi che la corroborano". Raymond L. Burke, "La *confessio iudicialis* e le dichiarazioni giudiziali delle parti", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), Città del Vaticano, Libreria Editrice Vaticana, 1995, 18. For Llobell, the judicial confessions of the parties cannot have the force of full proofs for two reasons: "a) anzitutto perché le dichiarazioni dei coniugi non sono una vera confessione perché non sono affermazioni 'contro' se stessi e b) perché la natura pubblica di tali cause esige che il giudice abbia certezza morale di raggiungere la conoscenza della verità oggettiva". Joaquín Llobell, *I processi matrimoniali nella chiesa*, Roma, EDUSC, 2015, 201; John A. Renken, "The Testimony of Character Witnesses in Marriage Nullity Cases", *Philippine Canonical Forum* 15 (2013-2014), 181-216.

[16]Full proof is "that which furnishes the moral certitude because it 'excludes every founded or reasonable doubt' in favour of the position argued by the other party. Full proof can be a single proof or, normally, a collection of proofs from which moral certitude arises". Joaquín Llobell, "The Contentious Trial", in George Nedungatt, (ed.), *A Guide to the Eastern Code*, (Kanonika 10), Rome, PIO, 2002, 759.

[17]In Serrano's view, because the parties know the authentic truth of the case, their declarations have unique force. Therefore, the first step in arriving at moral certainty is the evaluation of the declations of the parties. Serrano Ruiz, "Vizione personale del matrimonio nel *CCEO*: aspetti sostanziali e di diritto procedurale", *Iura Orientalia* 7 (2011), 138. Frans Daneels observes, "The norm concerning the possibility that a judicial confession and the

If the previous law presumed not to give probative weight to the parties' judicial depositions, the new law's presumption is for attributing probative weight to these depositions, especially when witnesses attest to the credibility of the party. These "testimonial witnesses" have no direct, relevant knowledge but can attest to the party's credibility and reputation. They may also be able to corroborate that the account of the marriage the party has given to the tribunal is consistent with what he or she had told others at "non-suspect times". Such testimonial witnesses can lend even greater credibility to the depositions of the party itself[19].

Since the old and new norms demand similar conditions, changing the probative value of the parties' declarations is less radical than it might seem. In the cases concerning public goods, judicial confessions can provide full proof only when "possibly supported by witnesses to the credibility[20] of the parties," and "evaluated by the judge after he has considered all the indications and supporting factors, unless other

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declarations of the parties might constitute full proof (can. 1678 §1) is not only presented in a more positive way, but also omits the introductory clause of the former can. 1679: 'Unless there are full proofs from elsewhere'. This way of proving the nullity of a marriage is thus no longer only a subsidiary one, but may also be used when full proof could be obtained otherwise, notwithstanding, of course, the obligation to reach moral certainty for a declaration of nullity". Frans Daneels, "A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage", *The Jurist* 76 (2016), 119-120.

[18]John P. Beal, "*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary", *The Jurist* 75 (2015), 499; Thomas J. Green, "*Mitis et Misericors Iesus*: Some Initial Reflections", *Eastern Legal Thought* 12 (2016), 128. In the view of John P. Beal, "This change should go a long way toward eliminating the awkward conflict situations, not infrequent in the past, in which petitioners were certain in conscience that their marriages were invalid but are unable to prove this fact in the external forum because the weight of their own declarations were heavily discounted or because of a lack of corroborating witnesses". John P. Beal, "The Ordinary Process According to *Mitis Iudex*: Challenges to Our 'Comfort Zone'", *The Jurist* 76 (2016), 187.

[19]John P. Beal, "*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary", *The Jurist* 75 (2015), 499-500.

[20]"Sono *testi de credibilitate*, quelle persone che pur essendo estranee al fatto controverso, possono rassicurare il giudice sulla assoluta credibilità dei coniugi, per avvalorare le loro dichiarazioni o confessioni in giudizio, conferendo loro valore di prova piena". Valerio Andriano, *La normativa canonica sul matrimonio e la riforma del processo di nullità*, Città del Vaticano, Libreria Editrice Vaticana, 2016, 191.

elements are present which weaken them" (*CIC* c. 1678 §1 after *MIDI* and *CCEO* c. 1364 §1 after MEMI). Such an approach is specified by article 12 of the procedural rules of *MIDI* and *MEMI* on moral certainty[21]: "To achieve moral certainty required by law, a preponderance of proofs and clues is not sufficient, but it is required that any prudent doubt of making an error, in law or in fact, is excluded even if the mere possibility of the contrary is not removed".

Additionally, canon law requires free evaluation of the proofs as a matter of principle[22]. Proofs that can lead to moral certainty in judges are considered fully probative. The judge must evaluate them according to his/her conscience (*CIC* c. 1608 §3 and *CCEO* c. 1291 §3). Normally, a single proof – e.g., the unanimous declarations of the parties or the deposition of one qualified witness – does not suffice. Full proof usually derives from a totality of evidence that, taken individually, cannot establish moral certainty and only in their totality, a judge will be able to make a judgment without any reasonable doubt[23]. In short, according to Llobell, the judicial confession and the declarations of the parties can have the force of full proof only when

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[21]Joaquín Llobell, "Alcune questioni comuni ai tre processi per la dichiarazione di nullità del matrimonio previsti dal M.P '*MITIS IUDEX*'", *Ius Ecclesiae* 28 (2016), 29. According to Cavanaugh, "the difference is a matter of emphasis, not substance". Timothy J. Cavanaugh, "Financial Irresponsibility and its Impact on the *communio* of Marriage: From Simple Facts to Juridic Facts", *CLSA Proceedings* 77 (2015), 120; Miguel Ángel Ortiz, "La valutazione delle dichiarazioni delle parti nelle cause di nullità del matrimonio", *Ephemerides Iuris Canonici* 56 (2016), 449-486.

[22]Free evaluation of proofs means, the judge is to be free to examine each piece of evidence within the context of all the evidence, and thus reach a reasonable conclusion about the objective weight of each piece of evidence. However, the principle of free evaluation does not give the judge the permission to arbitrarily determine what weight a piece of evidence has. In order to prevent arbitrariness, judges must rely on the fourfold guidance provided by the canonical sources. They are: 1) legal principles which explain how a piece of evidence is to be evaluated (without assigning a certain weight to the evidence; 2) jurisprudence; 3) the insights of proven authors; 4) the judge's own experience. Felice, "Juridical Formalities and Evaluation of Evidence in the Canonical Process", *The Jurist* 38 (1978), 154-155; William L. Daniel, "The Notion of Moral Certitude with Particular Application to the Acts Mentioned in Canon 1682 §2 (*CCEO*, ca. 1368 §2)", *CLSA Porceedings* 72 (2010), 150.

[23]Joaquín Llobell, "Alcune questioni comuni ai tre processi per la dichiarazione di nullità del matrimonio previsti dal M.P 'MITIS IUDEX'", *Ius Ecclesiae* 28 (2016), 30.

they are supported by other indications and factors of a matrimonial case[24].

The new *CCEO* c. 1364 §1 after *MEMI* (*CIC* c. 1678 §1 after *MIDI*) deals only with judicial confessions and declarations, i.e., those made before the judge during the trial. The assessment of the probative value of extra-judicial confessions, i.e., those made outside the judicial process, remain governed by *CCEO* c. 1218 (*CIC* c. 1537). According to this canon, "After considering all the circumstances, it is for the judge to decide on the weight to be given to an extra-judicial confession introduced into the trial".

In evaluating an extra-judicial confession, the judge must consider the circumstances of the confession made, such as its connection to other elements of the case, the credibility of the person making it, the circumstances surrounding it and the motive for it, when it was made, etc. If made before the process, the confession has occurred in *tempore non suspecto*[25]. In such situations, the party would not immediately

[24]Sabbarese is of the opinion that, "per valutare la veridicità delle deposizioni delle parti, dal momento che queste di per sé non hanno forza di prova piena secondo il can. 1536 §2, il giudice in primo luogo attinge da altra fonte prove indubitabili sulla loro credibilità; in secondo luogo, e se non ritiene sufficienti le testimonianze sulla credibilità delle parti, si serve di altri indizi e ammennicoli, elementi accessori d'appoggio e di prova. La confessione giudiziale e le dichiarazioni delle parti possono avere forza di prova piena, a condizione che non vi siano altri elementi contrari e che il giudice possa sulla base di tutti gli indizi e gli ammennicoli, formarsi una valutazione in tal senso". Luigi Sabbarese, "I processi matrimoniali e il vescovo giudice tra i fedeli a lui affidati", in *Nuove norme per la dichiarazione di nullità del matrimonio* (presentazione), Bologna, Edizioni Dehoniane, 2016, 20. According to Cavanaugh, the 'elements' throroughly corroborate the declarations of a party or the testimony of one witness "when a person is reputed to be honest and reliable, when he or she has no personal interest in the outcome of the case (or is at least shown to be willing to attest to facts that are against that interest), when he or she is attesting from firsthand personal knowledge, when his or her account is confident and internally consistent, and when he or she is factually corroborated or at least not contradicted in other important matters, then and only then is the judge justified in attributing full probative value. When even one of those elements is missing, or put, conversely, when even one weakening element is present, then prudent doubt remains". Timothy J. Cavanaugh, "Financial Irresponsibility and its Impact on the *communio* of Marriage: From Simple Facts to Juridic Facts", *CLSA Proceedings* 77 (2015), 121-122.

[25]Arroba Conde reiterates that every declaration made by the parties before the beginning of the process has greater probative value. He says,

have a vested juridic interest in making the statement. On the other hand, if the confession is made after a case has begun, the party is presumed to know the potential usefulness of his or her statement. During this "suspect" time, it is possible that one of the parties is trying to construct a case rather than permitting the truth to be uncovered[26]. In any case, the judge will take into account all these elements before giving a probative value to the extra-judicial confessions. It should be noted that extra-judicial confession can have full probative value[27].

The judicial confessions and declarations, and the extra-judicial confessions of the parties in *tempore non suspecto* are the direct and the most efficient source of proof for the marriage nullity cases based on *dolus*. However, the judge must carefully and thoroughly evaluate the declarations of the parties before arriving at a definite sentence[28]. The judge will have to consider the credibility of the parties, that is, their will to tell the truth. In addition, the judge should evaluate whether

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"ogni dichiarazione fatta dalle parti prima che fosse insorta la controversia, o almeno prima che fosse prospettata la possibilità di risolvere la loro controversia rivolgendosi al giudice, gode di grande prestigio e valore ai fini di ricostruire obiettivamente i fatti storici. Il minor rischio di distorsione soggettiva, tipico di queste dichiarazioni, proviene proprio dal fatto di essere state rilasciate dalle parti in tempo non sospetto". Manuel J. Arroba Conde, *Diritto processuale canonico*, 426-427.

[26]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 158; John P. Beal, "*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary", *The Jurist* 75 (2015), 500; Thomas J. Green, "*Mitis et Misericors Iesus*: Some Initial Reflections", *Eastern Legal Thought* 12 (2016), 128.

[27]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, New York, Paulist Press, 2000, 1673.

[28]Paul Robbins points out that many of those who approach tribunals are in ignorance about what constitutes the nullity of a marriage and this innocence can be of assistance, in the sense that it gives some assurance that the presented evidence is not tainted in favour of a particular viewpoint and so is a reliable truth. He persuades us to view with suspicion the evidence brought by the persons who have some awareness of the grounds for nullity. However, he concludes by telling that it is never appropriate to presume that evidence in favour of nullity is false or misleading. A judge should not treat evidence as other than truthful unless there is a reason that indicates to the contrary. Paul Robbins, "*Mitis Iudex Dominus Iesus*: Some Personal Reflections and Practical Applications", *The Canon Law Society of Great Britain and Ireland* 184 (2015), 85.

the declaration of the party makes sense, especially in the light of the other facts that the judge knows about the party's personality and, perhaps most importantly (in case of the declaration of only one party), what is the reason why the case is being based only on this person's declaration[29]. This is to avoid the deceitful conspiracy between the parties. The judge must assess not only the credibility of the person but also his/her objectivity. Credibility can be deduced from the morality and honesty of the parties as well as the testimonials referring to their credibility and integrity[30]. Unless these things are considered carefully and adequately, there is a grave danger of manipulating the judicial confessions and declarations by the parties involved in a case for obtaining an inexistent nullity of marriage. Now, with the promulgation of the new *motu proprii* (*MIDI* and *MEMI*), an accurate evaluation of the judicial declarations and confessions of the parties becomes more important as they are capable of assuming the force of full proofs.

1.2 Documentary Evidence

Proofs by documents are admitted in all types of trial, whether involving the public good or private good. *CCEO* c. 1220 (*CIC* c. 1539) distinguishes between two kinds of documents: public documents and private documents. *CCEO* c. 1221 §1 (*CIC* c. 1540 §1) defines public documents[31]. According to this canon, "public ecclesiastical documents are those that a person has drawn up by virtue of that person's function in the Church, after the solemnities prescribed by law have been observed". From this definition, we can observe that the public documents (1) must be drawn up by a designated ecclesiastical authority (2) in the exercise of his or her office or function (3) after

[29]Lynda Robitaille, "Evaluating Proofs: Is it Becoming a Lost Art?", *The Jurist* 57 (1997), 550.

[30]The evaluation of the declarations of the parties can be done tby the following criteria. 1) The moral criterion: the honesty of the party; 2) the mental criterion: the source of information; 3) the material criterion: the consistency or inconsistency of the declaration; 4) the numerical criterion: the corroboration or non-corroboration of the declaration; 5) the temporal criterion: the time in which the information was obtained. Peter O. Akpoghiran, *Proofs in Marriage Nullity Process*, 42-44.

[31]Public documents are of two kinds: ecclesiastical and civil. A public ecclesiastical document is one drawn up by a Church official in the exercise of his or her function. Whereas public civil documents are those which the civil authority of the place declares to be so. Peter O. Akpoghiran, *Proofs in Marriage Nullity Process*, 46.

having observed the proper formalities for preparing the document in question[32]. All the documents without these elements are private documents[33].

About the probative value of the public documents submitted by the parties in a trial *CCEO* c. 1222 (*CIC* c. 1541) states: "unless contrary and evident arguments prove otherwise, public documents are to be trusted concerning everything that they directly and principally affirm, with due regard for the civil law of the place that establishes otherwise regarding civil documents". Since, public documents (both ecclesiastical and civil) are presumed to be accurate with regard to the facts they directly and principally affirm[34], they do not require further

[32]Examples of public ecclesiastical documents include rescprits of the Apostolic See and other ecclesiastical authorities, tribunal decrees, and certificate of baptism, etc. Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1674.

[33]Letters, diaries, financial records, tape recordings, photos, etc, are examples of private documents. According to Donata Horak the category of private documents is very vast. She gives a list of more frequent private documents in the matrimonial cases. They are "1) lettere che le parti si siano scambiate durante il periodo di fidanzamento o durante il matrimonio, ma comunque in tempi non sospetti; 2) lettere inviate da una parte a terze persone o a se stessi; 3) dichiarazioni rese davanti ad un notaio civile, con o senza giuramento; 4) atti delle testimonianze rese dinanzi al tribunale civile, o verbali della Polizia; 5) certificati rilasciati dalla pubblica amministrazione; 6) certificati medici; 7) informazioni scritte raccolte da detectives privati; 8) confessioni extragiudiziali precostituite; 9) dichiarazioni giurate rese al parroco". Donata Horak, "La prova documentale", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), Città del Vaticano, Libreria Editrice Vaticana, 1995, 34-35.

[34]For example, in the case of a baptismal certificate, the principal fact is that the sacrament of baptism was conferred, and what was perceived by the senses is the how, when where and who of the baptism. Other details such as the person's age, birth or parentage are not principal facts of a baptismal certificate. Whereas these facts are principal facts of a civil birth certificate. José Maria Iglesias Altuna, "Documentary Proof", in Ángel Marzoa, Jorge Miras and Rafael Rodríguez-Ocaña, (eds.), *Exegetical Commentary on the Code of Canon Law*, Vol. IV/2, Montreal, Wilson & Lafleur, 2004, 1228. It is true that usually, in public documents there will be more than one item of information. However, the probative value can be assigned to only that information for which the document is primarily meant. For example, in a divorce decree, besides the date of the divorce, there will be other information such as the date of marriage, child support, etc., but in front of an ecclesiastical tribunal a divorce decree directly and principally states that the parties were granted the

corroboration to have probative value. Therefore, the public documents have the force of full proof with regard to their contents directly and principally intended[35]. However, the principal information established by public documents can be proven to be erroneous by other clear and evident proofs. For example, the document may not be authentic or the information contained in that document may not be true, misleading or incorrect, or the document is not drawn by a public authority, etc. In such cases, mere suspicion will not be sufficient to prove the falsity of a public document but clear and evident documents and arguments are needed to prove its falsity[36].

Unlike public documents, private documents cannot have the force of full proof unless they are corroborated by other elements and indices of the case. "A private document, whether acknowledged by a party or approved by the judge, has the same probative force against the author or signer and those deriving a case from them as an extra-judicial confession. However, against others, its probative force is to be evaluated by the judge together with other aspects of the case, but it cannot be given full probative force unless there are other elements that fully corroborate it" (*CCEO* c. 1223 and *CIC* c. 1542). From the description of the canon it is clear that private documents have the same probative value of extra-judicial confessions and to have full probative value, they must be corroborated by other proofs and indices such as the parties' declarations, testimony of the witnesses, report of experts, the time in relation to the marriage in which the document was written, etc[37].

It should be kept in mind that, "the documents do not have probative force in a trial unless they are originals or authentic copies and are deposited in the chancery of the tribunal so that the judge and the opposing party can examine them" (*CCEO* c. 1225 and *CIC* c. 1544). Documents submitted to the tribunal must be original so that they can

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divorce on such a date. Peter O. Akpoghiran, *Proofs in Marriage Nullity Process*, 48-49.

[35]Manuel J. Arroba Conde, *Diritto processuale canonico*, 447.

[36]Peter O. Akpoghiran, *Proofs in Marriage Nullity Process*, 49. According to Donata Horak, "la dimostrazione della non autenticità, o della falsità e contradittorietà del contenuto, ovvero del difetto di forma e delle solennità richieste dal diritto può avvenire mediante l'escussione di testimoni, la produzione di documenti contrari, l'ispezione oculare o collazione". Donata Horak "La prova documentale", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), 38.

[37]Peter O. Akpoghiran, *Proofs in Marriage Nullity Process*, 49.

be examined by the judge, the parties or the legal representatives of the parties, the defender of the bond and the promoter of justice if involved in the trial (*CCEO* c. 1363 §1, 2º after MEMI and *CIC* c. 1677 §1, 2º after MIDI). The inspection of documents consists in the verification of the authenticity and the accuracy of the information contained in them. This inspection must also include the analysis of the relevant circumstances in which the document is drawn up. As a general norm, judges should insist on the presentation of original documents or certified copies. At times, because of the unavailability of the original documents, the parties submit photocopies of the documents to the tribunals. In such cases, it is subject to the judge's careful consideration to include them into the acts of the case and then to determine their authenticity and genuineness[38]. However, in such cases, judges cannot uncritically accept them as authentic. Judges may incorporate the copy into the acts of the case and evaluate its authenticity in the light of other evidence[39].

Documents can be paramount proofs, since they may contain information that is unavailable from other sources. At the same time, the judge should evaluate with much attention the authenticity and genuineness of the information contained in them because they may contain ambiguous or erroneous information[40]. Rotal jurisprudence indicates documental proofs as a very useful mean to demonstrate the *deceptio dolo patrata*, overcoming the presumption of the validity of marriage[41] (*CCEO* c. 779 and *CIC* c. 1060). Utilization of documentary

[38]A document is called **authentic** if it is written by the author to whom it is attributed and it is called **genuine** if what is expressed in the document is objectively true.

[39]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1676.

[40]Allesandro Giraudo reiterates the importance of the careful evaluation of the proofs, especially documentary proofs before adimitting them in the matrimonial cases. He says: "a fronte di documenti o di altri strumenti di prova, quali quelli digitali prodotti con le nuove tecnologie, sarà sempre indispensabile una prima valutazione dell'autenticità, cioè l'attribuzione ad un soggetto certo, così che non restino 'anonimi', e dell'integrità, così che si accerti la mancanza di manipolazioni che ne modifichino il contenuto". Allesandro Giraudo, "La scelta della modalità con cui trattare la causa di nullità: processo ordinario o processo più breve", in AA. VV., *La riforma dei processi matrimoniali di Papa Francesco*, Milano, Ancora, 2016, 56.

[41]Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 122.

proofs is very important in marriage nullity cases on the ground of deceit where the object of *dolus* is mental or physical illness, situations of drugs or alcohol addiction, sterility, one's chronological age, pregnancy, the title of the study, etc. The presence or absence of these qualities can easily be proved with an authentic document. In short, documentary proofs will be an extremely helpful aid to the judge in arriving at moral certainty.

1.3 Testimony of Witnesses

Witness[42] testimony is one of the most important proofs in marriage nullity trials. Already with his or her petition, the petitioner is asked to point out not only the grounds upon which the assertion is made, but also the proofs that will be adduced to support the petitioner's claim. This includes indicating the possible witnesses who will support the allegations made by the petitioner (*CCEO* c. 1187, 2º and *CIC* c. 1504, 2º). The testimony of witnesses forms the substantive body of the evidence which will either strengthen or weaken the petitioner's assertion[43]. Therefore, the testimony of witnesses has an inevitable role in the marriage nullity trails.

When legitimately summoned by the judge in a trial, the witnesses have the grave moral and juridical obligation to tell the truth. This obligation is violated not only by telling the falsehood, but also by concealing the truth[44]. However, according to *CCEO* c. 1229 §2 (*CIC* c. 1550 §2), the following category of persons are exempted from the obligation to respond in a trial: "1º clerics regarding what has been made known to them by reason of sacred ministry; civil officials, physicians, midwives, advocates, notaries, and others also bound to

[42]A witness is a suitable person who is summoned by the judge to trial to make known the judge his or her observations concerning the controverted matter. According to Arobba Conde, "la prova testimoniale è l'atto processuale consistente in una dichirazione di scienza o conoscenza su di un fatto passato (anteriore alla causa) esposto davanti al giudice da una persona alla causa, detta testimone". Manuel J. Arroba Conde, *Diritto processuale canonico*, 452.

[43]Peter O. Akpoghiran, "The Evaluation of Witness Testimony in Marriage Nullity Trials", *The Jurist* 70 (2010), 163.

[44]Albert Gauthier, "La prova testimoniale nell'evoluzione del diritto canonico", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), Città del Vaticano, Libreria Editrice Vaticana, 1995, 54; Giannamaria Caserta, "Brevi osservazioni storico-giuridiche sulla prova per testi nell'ordinamento della chiesa", *Revista Española de Derecho Canónico* 71 (2014), 877-890.

observe secrecy by reason of having given advice, regarding those matters subject to this secrecy; 2º those who fear that from their own testimony ill fame, perilous ill-treatment, or other grave evils will befall them, their spouse, or persons related to them by consanguinity or affinity". The reason for this exemption is that people should be free to speak with these officials without fear. If there is a possibility of the divulgation of secrets talked to these officials, people will naturally be hesitated to approach them. Nevertheless, these exceptions extend only to that information acquired in course of his or her official duties[45]. Besides, both clerics and lay-persons can be relieved from the obligation of the professional secrecy by the confiding party, except for sacramental confession[46].

All persons[47], who have knowledge relevant to the dispute at issue, can be witnesses unless the law excludes someone expressly. Law explicitly excludes certain persons who cannot fulfil the function of a witness in a trial. *CCEO* c. 1231 (*CIC* c. 1550) gives a list of persons who cannot assume the role of witnesses. "§1 Minors below the fourteenth year of age and those of limited mental capacity are not allowed to give testimony; they can, however, be heard following a decree of the judge that declares such a hearing expedient. §2 The following are considered incapable of giving testimony: 1º the parties in the case or those who stand in for the parties at the trial, the judge and the judge's assistants, the advocate, and others who assist or have assisted the parties in the same case; 2º priests regarding all matters that they have come to know from sacramental confession even if the penitent seeks their disclosure; moreover, matters heard by anyone and in any way on the occasion of sacramental confession cannot be accepted as an indication of the truth". Except for these above-mentioned persons, all can be witnesses in a marriage trial[48]. However, it is up to the

[45]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1679.

[46]Manuel J. Arroba Conde, *Diritto processuale canonico*, 454.

[47]By all persons here we mean the persons who are competent under the law and who have the proper knowledge of the facts of a case, and when inquired by the judge, who are capable of communicating these facts to the judge.

[48]According to the weight of the testimony, judicial witnesses may be of several kinds: 1) **public or qualified**: public persons who attest matters having to do with their office, for example, a parish priest in the administration of the sacraments; 2) **private**: non-public persons or public persons who are not attesting to acts falling within their (public) office; 3) **first-hand (*de scientia*)**: these witnesses testify that they know that an event

discretion of the judge to exclude someone from assuming the role of witness in a trial[49].

The legislator has established clear norms for the evaluation of the testimony of the witnesses as well. *CIC* c. 1253 (*CIC* c. 1572) affirms: "in evaluating the testimony, the judge, after having requested testimonial letters if necessary, is to consider the following: 1º what the condition or reputation of the person is; 2º whether the witness testifies from first-hand knowledge, especially regarding what has been seen or heard personally, or from his or her opinion, rumour or hearsay; 3º whether the witness is reliable and firmly consistent or inconsistent, uncertain or vacillating; 4º whether the witness has co-witnesses to the testimony or is confirmed or not by other items of

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happened because they perceived it with their own senses, i.e., by virtue of having seen (eye-witnesses) or heard (hearsay witnesses) said event; 4) **second-hand**: these witnesses testify that they know something through third parties; 5) **credulity**: these witnesses testify to something deduced by reasoning; 6) **witness of rumours**: these witnesses only say they know something by neighbourhood rumours; 7) **witnesses of repute**: these witnesses speak of common, solid, unanimous feeling about a fact at a given place; 8) **consistent witnesses**: two or more witnesses who agree on the substance of a fact; 9) **singular witnesses**: two or more witnesses, each of who describes a fact differently. Juan José García Faílde, "Witnesses and Testimony", in Ángel Marzoa, Jorge Miras and Rafael Rodríguez-Ocaña, (eds.), *Exegetical Commentary on the Code of Canon Law*, Vol. IV/2, Montreal, Wilson & Lafleur, 2004, 1245; G. Taylor, *Catholic Marriage Tribunal Procedure*, Bangalore, Theological Publications in India, 1981, 92. In the opinion of Craig hearsay evidence and even the opinion of a witness are particularly important in marriage nullity cases, where witnesses may rarely be in a position to observe the events directly. However, they may have the possibility of acquiring information indirectly. In certain cases, they might have even served as a confidant of one or both of the spouses. A witness of this sort of knowledge will be able to offer important and credible reports to the tribunal regarding matters relevant to the issue under consideration. Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1691.

[49]*CCEO* c. 1234 (*CIC* c. 1553) states: "It is the judge's responsibility to curb an excessive number of witnesses". This is an example of the judges' discretion in directing the trial and their responsibility to see that cases are concluded in a reasonable time (*CCEO* c. 1111 and *CIC* c. 1453). Besides, the evaluation of the testimony with discretion, it is up to the judge to admit, to reject and to interrogate witnesses and to present *ex ufficio* witnesses especially in the cases of a public good. Manuel J. Arroba Conde, *Diritto processuale canonico*, 455.

proof". First of all, the judge should evaluate[50] the condition or reputation of the witness. The term 'condition' refers to whether the person is a cleric, religious or lay, single or married. It also refers to social status, educational, religious, cultural, or social background, and honesty and integrity of the witnesses. The judge should also ascertain whether the witness is dependent or independent on other persons, especially the party introducing the person as witness; whether the witness has an interest in favouring one of the parties; has a friendship, kinship or social connection with the litigants; is introverted or extroverted; tends to lie; notices details in perceiving events; has a good memory; is a perjurer; is suspect or has been coached or informed; is spontaneous, etc[51]. In case of doubt regarding these factors, the judge can request testimonial letters[52], i.e., character references, for the witnesses[53]. As the probative value of a testimony of

[50]According to Peter Akpoghiran, the criteria for the evaluation of witness testimony can be grouped under five headings: 1) the moral criterion: the condition and honesty of the witness; 2) the mental criterion: the source of the information; 3) the material criterion: the consistency or inconsistency in the testimony; 4) the numerical criterion: corroborative and singular testimony; 5) the temporal criterion: the time in which the information was obtained. Peter O. Akpoghiran, "The Evaluation of Witness Testimony in Marriage Nullity Trials", *The Jurist* 70 (2010), 165-178. Quinn insists that the most important factors that should guide the judges in the appraisal of witness testimony are: 1) the character and reputation of the witness; 2) his rank and position, e. g. pastor; 3) circumstances, e.g. death bed testimony; 4) religious belief and practice – a religious person is more worthy of belief than one indifferent to religion; 5) capacity of the witness to observe and remember what he observes; 6) his manner of replying or giving testimony – certain or uncertain in his testimony, coherent, hesitant, evasive, hasty, or deliberate; 7) it is most useful to ascertain the source of knowledge in the witness – how, from whom, when did he learn the fact. John S. Quinn, "Evaluation of Evidence in Matrimonial Cases", *The Jurist* 16 (1956), 407-408.

[51]Feliciano Gil de las Heras, "The Credibility of Evidence", in Ángel Marzoa, Jorge Miras and Rafael Rodríguez-Ocaña, (eds.), *Exegetical Commentary on the Code of Canon Law*, Vol. IV/2, Montreal, Wilson & Lafleur, 2004, 1315.

[52]Most of the times, an ecclesiastical judge may not have personal knowledge regarding the character and integrity of a witness. In such cases, the judge may seek testimonial letters (for example, testimonial letter from the parish priest of the witness will be a very useful aid to know the integrity of the witnesses) in establishing the character and integrity of the witness.

[53]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 163-164.

witness rests upon the knowledge of the issue under consideration, judges should take into account the source of the information of the witnesses. First-hand information (something seen or heard personally) has more value than hearsay or rumour, or something was reported by second or third hand. Careful attention must also be given to the manner in which the witness testifies. Consistency, certainty and coherence of the narration will be indications of the truthfulness of the testimony.

According to *CCEO* c. 1254 (*CIC* c. 1573) the testimony of a single witness cannot produce full proof unless it concerns a qualified witness testifying about matters done *ex officio*, or unless the circumstances of things and persons suggest otherwise. The new *CIC* c. 1678 §2 after *MIDI* (*CCEO* c. 1364 §2 after *MEMI*) eliminates the negative assessment of the testimony of a single witness[54]. The canon states that the testimony of a single witness can produce full proof. "The testimony of one witness can produce full proof if it concerns a qualified witness making a deposition concerning matters done *ex officio*, or unless circumstances of things and persons suggest it" (*CIC* c. 1678 §2 after MIDI and *CCEO* c. 1364 §2 after *MEMI*). It is worthy to understand what the canon intends by qualified witnesses. "It refers to someone who testifies in a case, not on a personal basis, but on the basis of some official involvement, for example, the priest who officiated at the wedding, a doctor to whom the party confided, a policeman who was called to the house during a domestic quarrel"[55]. That means, the judge can arrive at the moral certainty with the deposition of a qualified witness who testifies on the basis of an official involvement. Such a deposition does not require any further

[54]The old principle governing the probative value of the testimony of a single witness was that "one witness is no witness" (*unus testis, nullus testis*). Pericle Felice, "Juridical Formalities and Evaluation of Evidence in the Canonical Process", *The Jurist* 38 (1978), 156-157. Cavanaugh affirms, "by rephrasing the negative rule positively, the legislator has not in anyway changed the conditions under which full probative value can be attributed to the otherwise uncorroborated testimony of a single witness; what he has done is to encourage judges to be attentive to those conditions under which it is possible, and to be ready to attribute full probative value when such an attribution is truly warranted". Timothy J. Cavanaugh, "Financial Irresponsibility and its Impact on the *communio* of Marriage: From Simple Facts to Juridic Facts", *CLSA Proceedings* 77 (2015), 118.

[55]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 165.

corroboration to have the force of full proof. The canon also establishes that the testimony of a non-qualified single witness[56] can produce full proof provided that circumstances of things and persons[57] support it. In every case, it is logical that full probative value cannot be attributed to the testimony of a witness that is very superficial, inconsistent and unbalanced[58].

Testimonial proof, very important in procedural law, helps a judge reach moral certainty about nullity. In *dolus* cases, confidants of those involved can testify accurately to their character and personal qualities. Consequently, such testimony can verify whether someone perpetrated *dolus* regarding one party's personal qualities (for example: moral qualities, honesty, personality, membership in a subversive group, etc.) to acquire the consent of the other party.

1.4 Expertise

The Codes of Canon Law wisely exhort judges to employ experts when it will help them reach moral certitude[59]. Expert analysis[60] is

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[56]At times, only one witness can be produced in a matrimonial trial. For example, some parties migrate far from the place of contract and lose contact with witnesses. In other cases, witnesses may refuse to testify due to anti-Catholic sentiment or bitter conflict with a party. *Manual of Matrimonial Law and Jurisprudence 1985*, Metropolitan Tribunal, Archdiocese of Los Angeles, cited in "Cases: Lack of Witnesses", *The Jurist* 49 (1989), 280; Peter O. Akpoghiran, "The Evaluation of Witness Testimony in Marriage Nullity Trials", *The Jurist* 70 (2010), 179; Grzegorz Leszczyński, "La prova testimoniale", *Apollinaris* 76 (2003), 561-574. However, if a single witness presents compelling, consistent, and corroborated testimony based on personal knowledge, the judge may accord it full probative value. Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1692.

[57]They are indications and proofs which, though insufficient in themselves to support a judgment, can together reinforce and give probative value to the deposition of one witness beyond doubt. Pericle Felice, "Juridical Formalities and Evaluation of Evidence in the Canonical Process", *The Jurist* 38 (1978), 156-157.

[58]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1692.

[59]The whole purpose of employing experts' reports is to aid the judge in clarifying doubts which may arise in the mind of the judge. Bernard de Lanversin, "De momento peritiae instituendae in processibus matrimonialibus recentioribus", *Periodica* 73 (1984), 580. *CCEO* c. 1364 §3 after *MEMI* (*CIC* can. 1678 §3 after *MIDI*) explicitly demands the use of experts as a means of proof in marriage nullity cases which are connected with impotence

considered a very useful proof: educated, experienced and skilled in a scientific discipline, experts use their professional skills to help a judge resolve a case[61]. The analyses of experts[62] are considered as a very useful form of proof[63]. The reports given by the experts will be absolutely important in the canonical process for the declaration of the nullity of marriage. Canon Law gives the ecclesiastical judges the right and sometimes the obligation to secure the service of experts[64]. The assistance of experts enables the judge to establish certain facts or clarify ambiguities concerning the significance of particular facts. The judge appoints experts in a particular case having heard the parties (including the defender of the bond and the promoter of justice if they

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or defect of consent. The canon states: "In cases of impotence or defect of consent because of mental illness or an anomaly of psychic nature, the judge is to use the service of one or more experts unless it is clear from the circumstances that it would be useless to do so; in other cases the prescript of can. 1255 is to be observed". Therefore, the intervention of experts is obligatory, not optional, in matrimonial cases under *CCEO* cc. 801 (*CIC* c. 1084) and *CCEO* c. 818 (*CIC* c. 1095). In such cases, the judge is bound by the law to seek the assistance of experts.

[60]According to Arroba Conde, "la prova periziale è la valutazione tecnica di un fatto operata con supporto scientifico (*examen*) da persone professionalmente competenti in materia, dette periti, che scrivono una relazione (*votum*) chiamata perizia". Manuel J. Arroba Conde, *Diritto processuale canonico*, 468.

[61]"I periti sono esperti in determinate materie i quali, senza avere un interesse personale nelle cause giudiziali, sono chiamati dal tribunale a dare un parere su una questione tecnica (di loro competenza) oggetto del dibattito processuale." Joaquín Llobell, *I processi matrimoniali nella chiesa*, 2011.

[63]Experts may come from different fields of science – psychology, anthropology, sociology, theology, finance, the authentication of documents, etc. Normally, the most frequently sought experts are from the fields of psychology and psychiatry in marriage nullity cases. However, in order to understand the cultural roots of marital practices of immigrant people, judges can seek the help of the experts in anthropology. Similarly, experts from sociology can shed light on the factors that influence the consent of people due to their careers or socio-economic conditions. Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1692.

[64]*CCEO* c. 1255 (*CIC* c. 1574) reads: "The service of experts must be used whenever a prescript of the law or the judge requires their examination and opinion, based on the precepts of art or science, in order to establish some fact or to discern the true nature of some matter".

are involved[65]). Furthermore, the judge also has the possibility to accept as a part of canonical proofs, reports already prepared by other experts (*CCEO* c. 1256 and *CIC* c. 1575).

It is the duty of the judge to define precisely the object of the inquiry and the specific task of the expert. Having heard and considered the points which the parties wish the expert to consider, the judge, through a decree, must specify clearly the individual points on which the expert's service must focus and determine the time within which the expert must complete the examination and submit the report. In marriage nullity cases based on *CCEO* c. 818 (*CIC* c. 1095), the judge should ask the expert to determine the presence or not of any mental illness or psychic disorder, its nature, severity duration, etc. If possible, he should also give a diagnosis and point out any influence such as an illness or disorder might have on the mental state and capacity of the patient[66]. In drawing the conclusion, the expert must indicate the source of information, the method followed and the principal arguments upon which the conclusions are made (*CCEO* c. 1259 and *CIC* c. 1578).

Once the expert's report has been presented, the judge must subject it to a serious evaluation[67]. He must ask several questions: has the expert

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[65]*CCEO* c. 1098 (*CIC* c. 1434) states: "Unless common law expressly provides otherwise: 1º whenever the law requires the judge to hear the parties or either of them, the promoter of justice or the defender of the bond must also be heard if they take part in the trial".

[66]John R. Keating, "The Province of Law and the Province of Forensic Psychiatry in Marriage Nullity Trials", *Studia Canonica* 4 (1970), 9; Charles Lefebvre, "De peritorum iudicumque habitudine in causis matrimonialibus ex capite amentiae", *Periodica* 65 (1976), 115; Antonio Stankiewicz, "La valutazione delle perizie nelle cause matrimoniali per incapacità psichica", *Monitor Ecclesiasticus* 118 (1993), 263-287; Vittorio Palestro, "Le perizie", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), Città del Vaticano, Libreria Editrice Vaticana, 1995, 71-92.

[67]According to Pompedda, to evaluate an expert's report means: "1) to take into account the deductive principles used in the report and the methods followed by the *peritus* or expert in the report; 2) to determine which facts or *indicia* in the acts have lead the experts to reach an opinion; whether these facts are truly demonstrated from the acts or from a specific medical examination; 3) to affect what may be called an effort at translating the expert's report from a psychological plane to a juridic plane; 4) to examine and then to accept only those conclusions of the expert which both are founded on widely-accepted scientific reasonings and are founded in the constant principles of rational psychology". Mario F. Pompedda, "Decision-

properly applied the scientific method? Are his inferences logical? Are his arguments based on proven facts and full knowledge of the case? Is the expert credible? Is he potentially biased? Is he objectively judging the credibility of the patient or is he operating according to the clinical criterion, which would accept as true all that a suffering and ill patient declares to an assisting physician?[68]

All the above considerations must form the part of the judge's evaluation. Even though the expert's report is very important, the judge himself must make the final decision in the case[69]. The expert serves solely to provide information within his or her specific competence: "The expert is not the judge, but rather an assistant who

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Sentence in Marriage Trials: Of the Concept and Principles for Rendering an Ecclesiastical Sentence", *Quaderni dello Studio Rotale* 4 (1989), 92.

[68]Kenneth Boccafola, "Experts", in Ángel Marzoa, Jorge Miras and Rafael Rodríguez-Ocaña, (eds.), *Exegetical Commentary on the Code of Canon Law*, Vol. IV/2, Montreal, Wilson & Lafleur, 2004, 1341; Zenon Grocholewski, "Il giudice ecclesiastico di fronte alle perizie neuropsichiatriche e psichologiche: considerazioni sul recente discorso del Santo Padre alla Rota Romana", *Apollinaris* 60 (1987), 196-198; Zenon Grocholewski, "The Ecclesiastical Judge and the Findings of Psychiatric and Psychological Experts", *The Jurist* 47 (1987), 464; Thomas G. Doran, "Some Thoughts on Experts", *Quaderni dello Studio Rotale* 4 (1989), 49-72.

[69] Mendonça advises keeping the following principle in mind: "The expert opinion does not become an adjudged matter (*res iudicata*). This principle implies that it is not within the competence of experts to bind the judge to their opinions in pronouncing the decision. The judge must critically evaluate an expertise in the light of all the facts and proofs contained in the acts of the case". Augustine Mendonça, "The Role of Experts in "Incapacity to Contract" Cases (canon 1095)", *Studia Canonica* 25 (1991), 442. It is also worthwhile to remember the warning of St John Paul II, who cautioned against using expert reports carelessly and uncritically. Rather, judges must determine whether the expert's presuppositions correspond to a truly Christian anthropology: "it must be recognized that the discoveries and achievements purely in the fields of psychology and psychiatry are not capable of offering a truly complete vision of the person. They are not capable of resolving on their own the fundamental questions concerning the meaning of life and the human vocation. Nevertheless, certain trends in contemporary psychology, going beyond their own specific competence, are carried into such territory and are introduced under the thrust of anthropological presuppositions that cannot be reconciled with Christian anthropology". John Paul II, *Allocution to the Roman Rota*, 5 February 1987, *AAS* 79 (1987), 1453-1459. English translation in William H. Woestmann, (ed.), *Papal Allocutions to the Roman Rota*, 1939-2011, Ottawa, Saint Paul University, 2011, 191.

helps the judge to formulate an opinion integrating the expert's findings with all other factors of the case"[70]. Consequently, the expert should not assess the validity of the marriage. The latter competence belongs exclusively to the judge,[71] who must consider the expert's report in the light of the other circumstances of the case to achieve moral certainty.

Although expert assistance can be extremely useful, the law does not prescribe it for cases of *dolus*. Nevertheless, at his discretion, the judge may seek such expertise to establish facts or clarify ambiguities. For example, when the object of *dolus* is quality of the other party, for example, sterility which cannot be proven by other means of proofs, the use of expertise will be inevitable and definitely helpful to establish the existence or not of this quality[72].

1.5 Presumptions

"A presumption is the probable conjecture about an uncertain matter. It requires a basis in order to be probable. This basis can be found either in law or in the facts"[73]. Presumptions constitute *indirect* proof, because they are constituted not by direct demonstration of a particular act, but by reasoning from a proven fact to a morally certain conclusion[74]. When properly used, they are a valuable tool for discovering the truth with moral certitude.

CIC c. 1584 defines presumptions[75]: "A presumption is a probable conjecture about an uncertain matter; a presumption of law is one

[70]Marie Breitenbeck, "The Use of Experts in Marriage Nullity Cases", *CLSA Proceedings* 51 (1989), 40.

[71]John Paul II, *Allocution to the Roman Rota*, 5 February 1987, *AAS* 79 (1987), 1453-1459. English translation in William H. Woestmann, (ed.), *Papal Allocutions to the Roman Rota*, 1939-2011, Ottawa, Saint Paul University, 2011, 194.

[72]It must not be forgotten that sterility neither prohibits nor invalidates marriage unless it is the object of *dolus*. (*CCEO* c. 801 §3 and *CIC* c. 1084 §3).

[73]James H. Provost, "Remarks Concerning Proofs and Presumptions", *The Jurist* 39 (1979), 465.

[74]Kenneth Boccafola, "Presumptions", in Ángel Marzoa, Jorge Miras and Rafael Rodríguez-Ocaña, (eds.), *Exegetical Commentary on the Code of Canon Law*, Vol. IV/2, Montreal, Wilson & Lafleur, 2004, 1348.

[75]Although there was a guideline to have maximum conformity with the procedural norms of *CIC*, *CCEO* did not contain a canon that defines presumptions. During the revision of the Code, one of the members recommended that *CIC* c. 1584 be introduced into the Eastern schema. The

which the law itself establishes; a human presumption is one which a judge formulates". Therefore, they can and are overturned by contrary proofs[76]. There are two types of presumption in Canon Law: 1) *praesumptio iuris* (presumptions of law) and 2) *praesumptio hominis* (human presumptions)[77].

Legal presumptions, established by the law itself[78], are conclusions the latter deduces from certain facts. In contrast, human presumptions are morally certain conclusions a person forms from evidence presented[79].

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response of the *Coetus de expensione observationum* stated: "Non sembra necessario ed utile accettare la proposta". *Nuntia* 28 (1989), 132.

[76]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1697. According to Pompedda, two characteristics distinguish a presumption: rationability and probability. **Rationability** is evident in the syllogistic structure of a premise: some particular fact (major premise) and some general principle of law or human prudence (minor premise) lead to a likely conclusion about an uncertain fact. That its conclusion is likely, but never absolutely certain, gives a presumption its **probability**. Mario F. Pompedda, "Decision-Sentence in Marriage Trials: Of the Concept and Principles for Rendering an Ecclesiastical Sentence", *Quaderni dello Studio Rotale* 4 (1989), 90.

[77]Human presumptions are further divided into *presumptiones naturae* and *presumptiones facti*. The *praesumptio naturae* is a presumption of man based on qualities or characteristics which belong to a man or his experience by his very nature. For example, a mother is presumed to love her child. On the other hand, the term *praesumptio facti* refers to either a presumption concerning what happened in the past based on the subsequent facts or a presumption concerning what will happen in the future based on the facts occurred in the past. Charles J. Scicluna, "The Use of 'List of Presumptions of Fact' in Marriage Nullity Cases", *Forum* 7 (1996), 46.

[78]Examples of legal presumptions related to the institution of marriage: 1) the presumption of the validity of a properly celebrated marriage (*CCEO* c. 779 and *CIC* c. 1060); 2) presumption of the validity of marriage of a party who was commonly held to be baptized or his/her baptism was doubtful (*CCEO* c. 803 §2 and *CIC* c. 1086 §3); 3) presumption of consumation if the spouses have lived together after the marriage (*CIC* c. 1061 §2); 4) presumption of the required understanding of marriage (*CCEO* c. 819 and *CIC* c. 1096); 5) the presumption that the internal consent of the mind conforms with the words and signs used in the celebration of marriage (*CCEO* c. 824 §1 and *CIC* c. 1101 §1); 6) the presumption that consent to marriage that was inefficacious due to an impediment or defect of form nonetheless persists until its withdrawal has been established (*CCEO* c. 827 and *CIC* c. 1107); 7) presumptions regarding paternity and legitimacy of children (*CIC* c. 1138).

[79]Kenneth Boccafola, "Presumptions" in Ángel Marzoa, Jorge Miras and Rafael Rodríguez-Ocaña, (eds.), *Exegetical Commentary on the Code of Canon*

In nullity trials, a judge[80] infers these conclusions based on the circumstances of the case[81]. They consist of conjecture about something not yet sure but consonant with how persons commonly act. Because human presumptions do not automatically remove the burden of proving their validity, they are not as efficacious as legal ones[82].

Legal presumptions have significant judicial consequences. In a trial, a person with a favourable presumption of law is freed from the burden of proof. As a result, the other party must bear this burden (*CCEO* c. 1266 and *CIC* c. 1585). For example, since the external expression of consent is presumed to reflect the actual, internal consent of the will (*CCEO* c. 824 §1 and *CIC* c. 1101 §1), one who disputes an allegation of simulation (*CCEO* c. 824 §2 and *CIC* c. 1101 §2) need not prove the proper intentions of the supposed simulator; the validity of the marriage is presumed (*CCEO* c. 779 and *CCEO* c. 1060). Consequently, the petitioner must demonstrate that at least one party consented only partially or not at all.

A judge can formulate human presumptions based on certain, determined facts related to the circumstances of the case (*CCEO* c. 1265 and *CIC* c. 1586) and directly connected to the disputed question[83]. Well-formed human presumptions will help the judge reach moral certitude: "Whenever the question of consent is concerned, presumptions must be frequently invoked by the judges in arriving at their decisions. A great deal of information is necessary to enable them to formulate these presumptions prudently and correctly"[84]. To form sound presumptions, judges must have a clear and deep understanding of their nature and role in the development of proofs. In marriage cases, human presumptions suggest nullity at some times

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Law, 1351. For example, a valid *praesumptio hominis* is the existence of insanity at the time of marriage ceremony, when the fact of insanity both before and after marriage is sufficiently established.

[80]Manuel J. Arroba Conde, *Diritto processuale canonico*, 489.

[81]Charles J. Scicluna, "The Use of 'List of Presumptions of Fact' in Marriage Nullity Cases", *Forum* 7 (1996), 47.

[82]Milchelle Flood, "Presumption in Canon Law and its Application to Marriage Legislation", *Studia Canonica* 41 (2007), 408.

[83]The requisites of human presumptions are essentially three: "certezza, determinatezza degli indizi, coerenza con il fatto controverso". Roberto Palombi, "Il valore delle *praesumptiones*", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), Città del Vaticano, Libreria Editrice Vaticana, 1995, 98.

[84]William Joseph Doheny, *Canonical Procedure in Matrimonial Cases*, Vol. 1, 424-425.

and validity at other times. For example, a judge might presume that a thirty-year common life supports validity unless contrary evidence proves otherwise[85].

The probative value of a presumption[86] consists in its persuasive force on the mind of the judge[87]. This force comes from the circumstances and facts upon which presumptions are based. Genuine presumptions are always rooted in the facts of a specific case[88], and therefore have probative value only for that concrete case. Consequently,

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[85]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1699.

[86]The general principle of canonical doctrine is that a presumption of law prevails over a presumption of man. A presumption of law provides full proof unless the contrary is proven, whereas a presumption of man generally provides only partial proof and needs to be corroborated. Charles J. Scicluna, "The Use of 'List of Presumptions of Fact' in Marriage Nullity Cases", *Forum* 7 (1996), 55.

[87]Depending on the weight, there is a hierarchy of presumptions: a) *levis* (light): a light presumption leads only to suspicion of the existence of a dubious fact; b) *gravis* (grave): a grave presumption results only in some degree of probability about the issue in dispute, but may, when taken in connection with the other facts and circumstances of the case, lend sufficient adminicular support to some other proof to generate moral certitude; c) *vehemens* (vehement): rigorously speaking, a vehement presumption is not really presumption at all for it is no longer a 'probable conjecture about an uncertain matter', rather it is a certain conclusion about the matter in dispute. John P. Beal, "The Substance of Things Hoped for: Proving Simulation of Matrimonial Consent", *The Jurist* 55 (1995), 772-773; Roberto Palombi, "Il valore delle *praesumptiones*", in AA. VV., *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale*, (Studi Giuridici 38), 99-100.

[88]After the promulgation of the new Code of Canon Law, there was a tendency among the North American Tribunals to apply pre-formed presumptions to whole classes of marriage nullity cases. In 1995, the Supreme Tribunal of the Apostolic Signatura, through a decree prohibited such practices. The Signatura warned that it cannot in any way presumed that nearly all the marriages which have been celebrated in the similar circumstance are null. The decree stated: "a) the use of 'presumptions' is prohibited because they 'do not have the probative value of real presumptions'. The 'presumptions' can be considered as aids to proof but they cannot bring moral certitude about the marriage's validity or nullity when the other evidence alone would not have given rise to certitude; b) use of the 'presumptions' is prohibited because 'their introduction and use pave the way for a jurisprudence which completely lacks a solid foundation'. Indeed, they manifest a mentality which favours the declaration of nullity of

it is illegitimate to apply human presumptions to cases beyond the one for which they were formulated. The starting point of every presumption must be a certain fact. For this reason, it is said, *praesumptum de praesumpto non admittitur*, that is, a presumption cannot be based on another presumption and a judge cannot make presumptions based on uncertain facts[89].

The adoption of *criterium reactionis* will be very helpful to formulate presumptions in marriage nullity cases based on *dolus*. When a deceived party discovers that his/her consent was obtained through deception, if there is an immediate reaction from the deceived party to interrupt the marriage, then one can positively deduce that there was a real connection between the error caused by deceit and the exchange of matrimonial consent. On the other hand, if the deceived party continued the marital life without difficulty then one will have to conclude that the party was not subjected to any deceit on a quality which would disturb the *consortium vitae*. Therefore, the behaviour of the deceived party at the discovery of deception has a great importance[90].

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marriage ... [and they] seem to correspond to a juridical order in which divorce is admitted, but they do not correspond at all with canonical doctrine and legislation". Supreme Tribunal of the Apostolic Signatura, "Decree Concerning the Use of 'Presumptions of Fact' in Marriage Nullity Cases", *Ius Ecclesiae* 8 (1996), 824-839; Charles J. Scicluna, "The Use of 'List of Presumptions of Fact' in Marriage Nullity Cases", *Forum* 7 (1996), 45-67. Moreover, Navarrete affirmed that the presumptions spoken in the Signatura's decree are not founded upon 'certain and determined facts', but on uncertain facts. Thus, they are not presumptions in the technical sense of the term; rather they are generalizations and affirmations which are not always a sufficient basis upon which one can form an argument. Urbano Navarrete, "Commentario al decreto della Segnatura Apostolica sulle cosidette 'Presumptions of Fact'", *Periodica* 85 (1996), 543.

[89]Urbano Navarrete, "Commentario al decreto della Segnatura Apostolica sulle cosidette 'Presumptions of Fact'", *Periodica* 85 (1996), 543; Charles J. Scicluna, "The Use of 'List of Presumptions of Fact' in Marriage Nullity Cases", *Forum* 7 (1996), 45-67.

[90]Some of the Rotal judges observed that even though the breaking up of marriage does not take place at the moment in which the other spouse discovers the truth, nevertheless, we should not forget the fact that every marriage has a specific story and the reactions of the deceived party must be considered together with the family background, character of the deceived person, social and professional situations. "Enim accidere potest quod ruptura hic et nunc multis ex causis impossibilis habeatur; quinimmo non insolitum videtur quod pro quodam tempore pars decepta, humaniter agens,

Presumptions will be of invaluable help to verify the credibility of other means of proof. In marriage nullity cases, presumptions are very useful to ascertain an intimate act of the mind of persons and thus to reach moral certainty. It can be achieved inasmuch as presumptions are legal and reasonable, and supported by the circumstances and indices of the case, and corroborated by other proofs. Without any shadow of doubt we can affirm that both legal and human presumptions are of immense help to arrive at moral certitude in marriage nullity cases under the ground of *dolus*. However, the individuality of each case is to be borne in mind before utilizing human presumptions.

2 *The Evaluation of Proofs and the Pronouncement of the Decision*

"The weighing or evaluation of the objective factors is the full, autonomous, and supreme power of the judge"[91]. Once all the proofs have been received, a judge's next obligation is to evaluate all of them them carefully in accord with the law. A comprehensive evaluation is essential. The ultimate goal of the matrimonial process is to ascertain whether some factor(s) invalidated the marriage. The proofs lead the judge to moral certainty regarding the intention of a party at the moment of consent[92]. To declare invalid the marriage in question, the judge must have the moral certainty which he obtains from the careful

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perscrutat momentum opportunnum ad separationem instaurandam. Quapropter mens vel indolis partis deceptae necnon circumstantiae prae et post nuptiales haud negligendae sunt et magni momenti sunt ad comprobandum assertum dolum". *Coram* Monier, 6 November 1998, in *SRR Dec*., 90, 713. *Coram* Ragni, 27 April 1993, in *SRR Dec*., 85, 295. In another Rotal decision, Monier affirmed, "Maximum momentum tribuendum quoque ad modum sese gerendi partis deceptae cum edocuts fuit de qualitatis carenita; tamen reactiones partis deceptae considerandae sunt una cum aestimatione: familiaris, indolis partis deceptae, ambientis socialis vel artis exercitae. Revera non insolitum videtur quod pro quodam tempore pars decepta, humaniter agens, perscrutat momentum opportunum ad separationem instaurandam". *Coram* Monier, 26 March 1999, in *SRR Dec*., 91, 217.

[91]Mario F. Pompedda, "Decision-Sentence in Marriage Trials: Of the Concept and Principles for Rendering an Ecclesiastical Sentence", *Quaderni dello Studio Rotale* 4 (1989), 89.

[92]According to Valerio Andriano, "nel processo canonico per l'accertamento della verità sulla validità del matrimonio, l'acquisizione e la valutazione delle prove ha sempre rappresentato un momento cruciale, con notevoli difficoltà per il giudice che deve pervenire alla certezza morale e fugare ogni possibile dubbio prima di pronunciarsi". Valerio Andriano, *La normativa canonica sul matrimonio e la riforma del processo di nullità*, 190.

weighing and consideration of all the proofs and circumstances of the case[93]. As a result, a careful evaluation of proofs acquires utmost importance in marriage nullity trials[94].

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[93]Aidan McGrath, "From Proofs to Judgement: The Arduous Task of the Judge", in Frederick C. Easton, (ed.), *The Art of the Good and Equitable: A Festschrift in Honor of Lawrence G. Wrenn*, 172. Pope Pius XII in his allocution to the Roma Rota affirmed: "Sometimes moral certitude is derived only from an aggregate of indications and which, taken singly, do not provide the foundation for true certitude, but which, when taken together, no longer leave room for any reasonable doubt on the part of a man of sound judgement. This is in no sense a passage from probability to certainty through a simple accumulation of probabilities, which would amount to an illegitimate transit from one species to another essentially different one. It is rather to recognize that the simultaneous presence of all these separate indications and proofs have sufficient basis only in the existence of a common origin or foundation from which they spring, that is, in objective truth and reality. In this sense, therefore, certainty arises from the wise application of a principle which is absolutely secure and universally valid, namely the principle of sufficient reason". Pius XII, *Allocution to the Roman Rota*, 1 October 1942, *AAS* 34 (1942), 338-343; English translation in William H. Woestmann, (ed.), *Papal Allocutions to the Roman Rota*, 1939-2011, Ottawa, Saint Paul University, 2011, 19.

Article 247 of *Dignitas connubii* affirms the importance of obtaining moral certainty in the pronouncement of a case and explains how a judge can arrive at moral certainty: "Art. 247 §1. In order to declare the nullity of a marriage there is required in the mind of the judge moral certainty of its nullity (cf. can. 1608, § 1)."

§2. In order to have the moral certainty necessary by law, a preponderance of the proofs and indications is not sufficient, but it is required that any prudent positive doubt of making an error, in law or in fact, is excluded, even if the mere possibility of the contrary remains.

§3. The judge must derive this certainty from those things which have been carried out and proven in the process (*ex actis et probatis*) (can. 1608, § 2).

§4.The judge must weigh the proofs according to his conscience, without prejudice to the prescriptions of the law regarding the efficacy of certain proofs (can. 1608, § 3).

§5. The judge who, after a diligent study of the cause, is not able to arrive at this certainty, is to rule that the nullity of the marriage has not been proven, without prejudice to art. 248, § 5 (cf. cann. 1608, § 4; 1060)".

[94]To have a proper evaluation of the proofs, "the judge must not only be endowed with a sufficient scientific preparation (canonical), but must be capable of practical judgement. He must also have some experience of both reality and of human nature. He must have sagacious intelligence. Above all, he must avoid scruples and anxieties which, through obfuscation and the setting of obstacles, can fragment and rend any serenity of judgement. On the other hand, a judge must not be given to excessive fantasizing and so risk not resolving a case

Criag A. Cox observed: "The weighing of the evidence is both a science and an art. It is, as well a great challenge. Judges are charged to assess the evidence and reach a decision according to their own consciences. The judgment of the conscience is to be guided by the law and jurisprudence concerning the efficacy of various types of proofs. But the freedom and responsibility of the judges to weigh the evidence in order to discover the truth is crucial"[95]. The guiding force in evaluating the evidence must be the teaching of the Church, constant Rotal jurisprudence and canonical norms. While evaluating a case, it is not enough for a judge to generally understand the relevant canons of the Code. Knowledge of the jurisprudence relevant to a case is also essential[96].

Internal acts are very difficult to prove. This must be done through logical arguments, undisputed and unequivocal facts, circumstances, presumptions, and indications that collectively leave no positive or prudent doubt in the mind of the judge[97]. The judge cannot simply point out the essential facts, however. Although the Code allows the judge to be convinced by any proof presented in the case, he or she

objectively but finding his judgement in arbitrary constructs. Equally dangerous in a judge is a tendency of spirit toward one person against another, such that the judge is unconsciously prejudiced toward the position of one other party". Mario F. Pompedda, "Decision-Sentence in Marriage Trials: Of the Concept and Principles for Rendering an Ecclesiastical Sentence", *Quaderni dello Studio Rotale* 4 (1989), 93.

[95]Craig A. Cox, "The Contentious Trial", in John P. Beal, James A. Coriden and Thomas J. Green, (eds.), *New Commentary on the Code of Canon Law*, 1716-1717.

[96]William L. Daniel, "The Notion of Canonical Jurisprudence and its Application to the Tribunal of the Roman Rota and Causes of Nullity of Marriage", *The Jurist* 76 (2016), 200.

[97]"Si intentio, e contra, asseritur solummodo tempore suspecto vel coram Tribunali, difficultas occurrere potest etiam sub adspectu probatorio in foro externo, cum in cognitione judiciali actus interni debeant solida, hoc est per argumenta logica, per facta indubia et inaequivoca, per circumstantias, praesumptiones, adminicula et indicia, simul quidem sumpta et cohaerenter in architectura argumentativa contexta, probari seu certitudine morali, nullum positivum seu prudens dubium relinquens in Judicum animo". *Coram* De Lanversin, 15 June 1992, in *SRR Dec.*, 84, 354. For example in the case of *dolus*, the judge will have to verify the quality of the person who deceives (it is right to suspect the person who was responsible for previous deceitful actions); the gravity of the quality; the general context in which the deceitful action takes place.

must be able to demonstrate the basis for that conviction[98]. An argument evident to the judge may be unclear to the reader, and obscured argumentation may conceal a poor reasoning. Therefore, to pronounce a just sentence, the judge must carefully evaluate the proofs, demonstrate their implications, and produce a well-reasoned sentence.

3 The Constitutive Elements of **dolus** *and the Means of Proofs*

To evaluate various aspects of a case, a judge must first of all identify the constitutive elements[99] of the ground in question. If any of the constitutive elements is lacking, the case cannot proceed under this ground.

Canonists identify either three or four constitutive elements of *dolus*[100]. For those who claim a threefold division, the essential elements to be

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[98]Lynda Robitaille, "Evaluating Proofs: Is it Becoming a Lost Art?", *The Jurist* 57 (1997), 547.

[99]Paolo Biachi asserts: "[…] la chiara identificazione degli elementi costitutivi della fattispecie normativa giocherà un ruolo di particolare importanza nella ricostruzione storica del caso, ossia in sede di attività istruttoria, apparendo del tutto logico e conveniente che chi cura lo svolgimento di questa delicatissima fase processuale debba procedere nella sua indagine avendo ben chiaro cosa deve cercare e tutto ciò che deve cercare". Paolo Biachi, "l'interpretazione del can. 1098 da parte della giurisprudenza della Rota Romana", in AA. VV., *Errore e dolo nella giurisprudenza della Rota Romana*, (Studi Giuridici 55), 109.

[100]There are authors who studied in detail the different divisions of the constitutitive elements of *dolus*. Paolo Bianchi, "L'interpretazione del can. 1098 da parte della giurisprudenza della Rota Romana", in AA. VV., *Errore e dolo nella giurisprudenza della Rota Romana*, (Studi Giuridici 55), Città del Vaticano, Libreria Editrice Vaticana, 2001, 103-120; Linda Ghisoni, "La decezione dolsa (can. 1098) secondo la giurisprudenza della Rota Romana: rilievi sistematici", *Quaderni dello Studio Rotale* 14 (2004), 62-84; Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 99-130.
In one of his studies, Paolo Bianchi affirmed that there five constitutive elements which must be verified in marriage nullity cases based on *dolus*. They are: "1) il dolo: ossia la volontarietà della azione od omissione posta in essere; 2) la specificità del dolo: ossia la sua finalizzazione all'ottenimento del consenso matrimoniale di almeno uno dei contraenti; 3) la situazione di errore in cui si trova il soggetto che patisce l'inganno e, precisamente, una situazione di errore qualificabile come essenziale, ossia – per esprimerci con la terminologia codiciale utilizzata in una norma relativa a materia assai affine alla presente – un errore *causam dans*; 4) l'oggetto dell'inganno sia una qualità personale di uno dei coniugi, nonché; 5) una qualità che sia per sua natura potenzialmente perturbava

verified are: 1) effective deceit perpetrated to obtain consent; 2) a fraudulent quality of the other party; 3) the fraudulent quality's potential to seriously disturb the conjugal partnership by its very nature[101]. On the other hand, those who advocate a fourfold division insist that the following elements must be proven: 1) *qui matrimonium celebrat deceptus dolo*; 2) *ad obtinendum consensum*; 3) *circa aliquam alterius partis qualitatem*; 4) *quae suapte natura consortium vitae coniugalis graviter*

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del consorzio di vita coniugale. Paolo Bianchi, "Esempi di applicazione giurisprudenziale del can. 1098 (dolo): casistica e problemi probatori", *Quaderni di Diritto Ecclesiale* 9 (1996), 372-373. Nevertheless, the same author, in a later study, identifies six constitutive elements: "1) che almeno uno dei contraenti si sia trovato in una situazione di errore, ossia di giudizio falso; 2) che l'errore sia stato efficace per la emissione del consenso (la norma dice infatti *deceptus dolo*), ovvero che si sia trattato di un errore *causam dans* la emissione del consenso; 3) che tale situazione di errore sia stata indotta dolosamente, ossia deliberatamente, in modo imputabile, da un terzo; 4) che tale azione dolosa fosse, come suol dirsi, specifica, ossia nel caso finalizzata alla emissione da parte del *deceptus* del consenso matrimoniale; 5) che l'oggetto dell'errore fosse una qualità personale di uno dei contraenti; 6) che tale qualità sia infine *suapte natura* tale da poter rappresentare un elemento gravemente perturbativo del consorzio di vta matrimoniale". Paolo Bianchi, "L'interpretazione del can. 1098 da parte della giurisprudenza della Rota Romana", in AA. VV., *Errore e dolo nella giurisprudenza della Rota Romana*, (Studi Giuridici 55), 110. Massimo Mingardi says that there seven points which must be demonstrated and proved singularly for making an affirmative decision on a case under *dolus*. "1) che il contraente fosse in stato di errore, e non di semplice ignoranza, circa una qualità dell'altra parte contraente le nozze, e che l'errore fosse anche oggettivo, cioè che il giudizio fosse effettivamente falso; 2) che l'errore riguardasse una qualità della comparte (non di altri), e si trattasse di vera qualità personale e non di una semplice circonstanza accessoria; 3) che tale qualità fosse atta a turbare gravemente la comunità di vita coniugale; 4) che lo stato di errore fu causato da qualcuno (normalmente il futuro coniuge, ma potrebbe trattarsi anche di una terza persona); 5) che ciò avvenne deliberatamente; 6) che fu fatto allo scopo di indurre alle nozze; 7) che la decisione del matrimonio dipese dall'errore, che quindi si configura come *errore causam dans* o *antecedens*; in altre parole, in assenza dell'errore causato da dolo la persona non avrebbe proceduto al consenso. Massimo Mingardi, "Fatti circostanziati e qualità personali in relazione all'errore doloso: aspetto dottrinali", *Quaderni di Diritto Ecclesiale* 26 (2013), 487.

[101]The Rotal judges are also not unanimous with regard to the division of the constitutive elements of *dolus*. There are Rotal judges who uphold the threefold division. For example, *coram* De Lanversin, 15 June 1989, in *SRR Dec.*, 81, 423-435; *coram* Ragni, 27 April 1993, in *SRR Dec.*, 85, 288-306; *coram* Bruno, 19 November 1993, in *SRR Dec.*, 85, 673-682;

perturbare potest[102]. A close examination of these two groups will prove that the difference between them concerns more the division of the matter than its substance[103]. The purpose of the identification of the constitutive elements is to establish the procedural method,

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[102]*Coram* Pompedda, 6 February 1992, in *SRR Dec.*, 84, 49-62; *coram* De Lanversin, 17 Marh 1993, in *SRR Dec.*, 85, 151-169; *coram* Stankiewicz, 17 January 1994, in *SRR Dec.*, 86, 56-76; *coram* Rangi, 19 December 1995, in *SRR Dec.*, 87, 714-723; *coram* Faltin, 30 October 1996, in *SRR Dec.*, 88, 671-679; *coram* Faltin, 15 December 1998, in *SRR Dec.*, 90, 843-852; *coram* Caberletti, 18 May 2001, in *SRR Dec.*, 93, 326-342.

In one of the rotal decisions, Defilippi enumerates the constitutive elements of *CIC* c. 1098 (*CCEO* c. 821) as follows: "Probatio, quae utique considerari potest sive 'directe' (seu procedens ex ipsius decepti ac deceptoris declarationibus tum iudicialibus cum extraiudicialibus, tempore insuspeccto factis, quas testes fide digni ac documenta in iudicio confirmare valent), sive 'indirecta' (seu ex agendi ratione dolum inferentis et dolo decepti) ad id ducere debet ut verificetur utrum in casu reapse perficiantur omnes condiciones statutae in can. 1098, de quibus diximus. Scilicet:

a) definiendum est quaenam fuerit qualitas alterius partis, circa quam deceptus dolo asserit se in errorem incidisse;

b) statuendum est sive momentum obiectivum illius qualitatis ad graviter perturbandum consortium vitae coniugalis, sive momentum subiectivum quod deceptus dolo illi qualitati tribuit;

c) constabiliendum est num illa qualitas (vel eiusdem absentia) ante matrimonium reapse ignorata fuerit ab eo qui dicitur dolo deceptus; scil.: num ipse in errore versaretur;

d) colligendum est num ille error ab asserto deceptore dolose inductus sit et quidem ad extoruendum consensum alterius partis;

e) explorandum est utrum modus agendi illius, qui se deceptum esse contendit, postquam veritatem detexit, reapse congruens an discrepans fuerit cum thesi quam propugnat coram Tribunali Ecclesiastico. Nam si ille absque difficultate et repugnantia, vitam coniugalem prosecutus est, non veri simile est in casu perfici condiciones statutas in can. 1098. E contra omnino credibilem reddit nullitatem matrimonii, ad mentem can. 1098, si assertus deceptus dolo, detecta veritate, valedixit alteri coniugi nec se dispositum praebuit reconciliationi, praesertim si ipse fervidus catholicus est, optime adhaeret doctinae Ecclesiae Catholicae et recte sentit de matrimonio eiusque proprietatibus". *Coram* Defilippi, 4 December 1997, in *SRR Dec.*, 89, 859.

[103]Linda Ghisoni reminds: "La divergenza è, tuttavia, più materiale che sostanziale in quanto nel primo tipo di enumerazione viene compiuta una specie di contrazione dell'azione dolosa e dell'errore, ritenendo che, ai fini della legge, sia rilevante solo la decezione che ha come effetto l'errore". Linda Ghisoni, "La decezione dolosa (can. 1098) secondo la giurisprudenza della Rota Romana: rilievi sistematici", *Quaderni dello Studio Rotale* 14 (2004), 66-67.

highlighting more or less analytically the subject-matter of the investigation to be carried out.

In any case, whatever be the division (three-fold or four-fold), to keep the integrity of the norm provided by *CCEO* c. 821 (*CIC* c. 1098), the judge must verify that in the given case all the essential elements are present: 1) *deceptio* (namely, the error caused by deception in which a party has fallen); 2) *dolus* (from the part of a person different from the deceived party); 3) *ad obtinendum consensum* (causal relation between deceit and error); 4) the consequence of the *deceptio* (emission of the consent, otherwise not given); 5) *alterius partis qualitatem* (object of deception and corresponding error); 6) *suapte natura consortium vitae coniugalis graviter perturbare potest* (the importance of that quality)[104]. A marriage case based on *dolus* will be declared null only when the presence of all these elements is verified[105]. As a consequence, the absence even of one of these elements will make inadmissible the nullity petition based on *dolus*.

3.1 The Deceptive Will

In matrimonial cases based on *dolus*, the first thing to be ascertained is the presence or not of the the deceptive will of a party[106]. According to Gerard Mckay, the proof of deceit must be established before determining the other essential elements which jointly form this ground of nullity[107]. The deceptive will can be deduced directly[108] from

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[104]Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 102.

[105]To avoid forceful and uncessary divisions, we shall divide the constitutive elements into four elements.

[106]Nothing excludes the consideration of a case on the ground of *dolus* if deceit is perpetrated by a third party other than one of the parties.

[107]Gerard Mckay, "Errore sulle qualità della persona, errore dolosamente provocato: le prove", in AA. VV., *La prova della nullità matrimoniale secondo la giurisprudenza della Rota Romana*, (Studi Giuridici 91), 192.

[108]According to Paolo Bianchi the specificity of *dolus* is demontrable also through indirect, logical or inferable proofs which derive from the circumstances and the motives of the actions of the agent of *dolus*: for example, if he or she holds it very important the celebration of marriage; if he or she pushes the other party for a speedy celebration of marriage; if he or she has other motives for making the deceitful action (for example, to protect the good fame of the family, avoid penal sanction, etc). He continues: "È pure molto importante sottolineare il rilievo della via indiretta o logica di prova, che spesso si trova ad essere l'unico strumento utlizzabile dal giudice, laddove il soggetto attivo del dolo rifiuti una collaborazione nella verità col Tribunale, cosa che spesso

judicial and extra-judicial confessions, both from the deceiver and the deceived confirmed by testimonies and documents[109]. Particular importance should be given to the extra-judicial confession of the *deceptor* because it is more reliable as it is made in *tempore non suspecto.* However, to prove with firmness the presence of *dolus*, the confession of the perpetrator is very important. The declarations of the petitioner are considered truthful if they have the characteristics of consistency and coherence. Nevertheless, the declarations of a party can have counter-effect if those declarations show intrinsic untrustworthiness[110]. If the presence of *dolus* cannot be established beyond doubt, then, the judge cannot proceed with the case. The fundamental principle is that *dolus* cannot be presumed but it must be proved with solid proofs and arguments[111]. Therefore, the verification of the deceptive will[112] is the first inevitable factor for a case to be handled on the ground of *dolus*.

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comporta che anche i testi da lui messi eventualmente a suo tempo al corrente dei suoi intenti si attestino su di un analogo atteggiamento di indisponibilità". Paolo Bianchi, "Esempi di applicazione giurisprudenziale del can. 1098 (dolo): casistica e problemi probatori", *Quaderni di Diritto Ecclesiale* 9 (1996), 376.

[109]Giuseppe Sciacca, "Deceit in Recent Rotal Jurisprudence", in P. M Dugan and L. Navarro, (eds.), *Matrimonial Law and Procedure*, Rome, Wilson & Lafleur, 2010, 145.

[110]Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 105. With regard to evaluation of the intrinsic and extrinsic credibility of the parties, Fabio Franchetto says: "Possiamo dire che risulta importante anzitutto valutare attentamente la credibilità intrinseca ed estrinseca delle parti, sopratutto quando il presunto *deceptor* nega di aver ingannato l'altra parte o quando ci troviamo di fronte ad un dolo omissivo. Le circostanze che compongono la genesi del matrimonio (chi propose le nozze, quali motivi portarono alla decisione nuziale) risultano essere indizi illuminanti per discernere la presenza o meno sia della volontà ingannevole da parte del *deceptor*, sia dell'errore subìto da parte del *deceptus* e in particolare il nesso di causalità tra dolo perpetrato e consenso dato". Fabio Franchetto, 'Fatti circostanziati e qualità personali in relazione all'errore doloso: riscontri giurisprudenziali", *Quaderni di Diritto Ecclesiale* 27 (2014), 127.

[111]"[…] dolus in negotiis iuridicis neque in iure romano praesumebatur (cf. 1, D. 2 de probatione), statuens limites iuxta regulam 'nisi ex magna et evidenti calliditate, non debet de dolo actio dari' (1, D. 7 de dolo malo)". *Coram* Faltin, 3 June 1998, in *SRR Dec.*, 90, 437.

[112]The deceptive will of a party may obtain the marital consent of the other party either by the production of false indicators (*dolus* by commission) or by

3.2 Error

The second requisite for handling a case under the ground of *dolus* is the establishment of the existence of error on the part of the *deceptus*. The error caused by deception must be an *error antecedens* or *causam dans* and not simply an *error concomitans*[113]. The declarations of the *deceptus*, the depositions of the witnesses and other elements represented by the so called criteria *aestimationis*[114] and especially

keeping silence of the presence of a negative quality (*dolus* by omission) that can disturb the *consortium vitae coniugalis*.

[113]"Il dolo è *causam dans* quando ha determinato la volontà dell'agente che, senza l'errore, non avrebbe posto in essere il negozio; è invece concomitante quando l'inganno non ha influito sulla determinazione dell'agente, così che il negozio, anche senza l'errore doloso, sarebbe stato ugualmente posto in essere, anche se a condizioni meno onerose per l'agente". Maria Teresa Romano, "Il dolo (can. 1098)", in AA. VV., *La giurisprudenza della Rota Romana sul consenso matrimoniale (1908-2008)*, (Studi Giuridici 83), Città del Vaticano, Libreria Editrice Vaticana, 2009, 94. Linda Ghisoni reiterates that the error caused by *dolus* must be an antecedent error not simply a concomitant error. In order to substantiate this argument she gives an example: "Si pensi, per esempio, al caso, non tanto improbabile, in cui una donna sposi un uomo il quale le nasconde la propria sterilità per paura di perdere quella donna. Questa sembra essere la classica fattispecie dolosa. Qualora, tuttavia, quella donna, che ignora la infertilità del marito e lo ritiene invece fertile, lo avrebbe ugualmente sposato anche se fosse stata messa al corrente di quella qualità, si sarà in presenza di un mero errore concomitante o incidente, non causam dans". Linda Ghisoni, "La decezione dolosa (can. 1098) secondo la giurisprudenza della Rota Romana: rilievi sistematici", *Quaderni dello Studio Rotale* 14 (2004), 69.

[114]By criterion *aestimationis* we mean the importance given to a quality by the *deceptus* and its capacity to disturb the *consortium vitae coniugalis* if that quality is not found in the other partner. It is considered very useful to determine whether the error on that quality was decisive in giving the consent. With regard to criterion *aestimationis*, it is enlighting *coram* Stankiewicz of 27 January 1994 which examines the *dubium* both personal quality *directe et principaliter intenta* and *deceptio dolosa*. Stankiewicz affirms that the subjective estimation of the quality on the part of the party in error must be verified, that is, how much importantce he/she attributed to that quality before the celebration of the marriage and how he/she reacted when it is discovered that the quality was lacking in the other party: "in errore spontaneo attendenda est potissimum subiectiva aestimatio qualitatis ex parte errantis, videlicet quanti eam habuerit ante celebrationem nuptiarum et quomodo sese gesserit detecto qualitatis requisitae defectu, ita in deceptione dolosa perspicienda est machinatio dolosa ex parte deceptoris ad inducendam alteram partem in errorem de qualitate graviter perturbante consortium vitae coniugalis in ordine ad obtinedum eius consensum. […] Si enim ipse, detecta veritate, statim convictum coniugalem interruperit,

reactionis[115] will be suitable means to establish the existence or not of the error of quality by deception. With regard to the criteria *aestimationis* and *reactionis*, they are often intertwined in a combined consideration of *aestimatio* and *reactio*, drawing the second from the

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compartem dimittendo et accusando eam deceptionis, praesumptio stat pro inductione in errorem spontaneum vel dolosum. E contra, si ipse absque difficultate ac repugnantia vitam coniugalem prosecutus sit, immo et prolem procreaverit ex comparte, praesumi potest ipsum nec qualitatem directe et principaliter requisisse, neque deceptionem passum esse ad obtinendum consensum. *Coram* Stankiewicz, 27 January 1994, in *SRR Dec.*, 86, 69-70.

Regarding *criterium aestimationis*, Mauro Bardi affirms, "[…] una volta accertata la *deceptio in re obiective gravis*, non necessariamente il giudice dovrà pronunciare la nullità del matrimonio. L'attività di accertamento dovrà infatti necessariamente estendersi anche ad una valutazione di carattere soggettivo circa la pertubazione del *consortium coniugalis*; in questo senso sarà dunque necessario verificare se la *qualitas* di cui all'inganno risulterà sgradita anche a colui che abbia impugnato il matrimonio, di guisa che, in sua presenza mai avrebbe sposato. […] In sostanza, dopo essersi rifatti ad una *voluntas praesumpta contraria* tratta necessariamente su base oggettiva, bisognerà far riferimento ad un ipotetico-concreto volere del *deceptus*; cioè bisognerà cercare di ricostruire con la maggior precisione possibile quella *aestimatio* che egli avrebbe espresso o potuto esprimere nei confronti della *qualitas* oggetto di dolo. Qualora si debba giungere alla certezza, che, pur trattandosi di una *deceptio* in *re gravi*, il *deceptus* avrebbe egualmente acconsentito, la sentenza dovrà risultare necessariamente *negativa*". Mauro Bardi, *Il dolo nel matrimonio canonico*, 227-229. In such a case, for that party, the lack of a determined quality – deceifully hidden – was not important. Even though the party knew the truth, in any way he/she would have married the other party. The reason for not considering this case under *CCEO* c. 821 (*CIC* c. 1098) is that the error – although caused by deceit – did not vitiate the will to celebrate the marriage (lacks the cause/effect relationship between error caused by *dolus* and consent).

[115]By criterion *reactionis* we mean how a deceived party reacted at the discovery of the lack of the quality. With regard to criterion *reactionis* and its utilization to prove if a quality, which is the object of the error, was effectively important for a person deceived, Boccafola makes the following observation: "if the party who learns about the deceit has no serious reaction, but rather accepts the situation as it is, then, it is most likely that he or she does not feel deceived and that the quality itself was not of the type that *suapte natura* would seriously disturb the *consortium vitae*. On the other hand, if one of the spoues, the moment he or she learns the truth, should immediately separate from the other party and denounce the fraud, one can presume that there has been deception; but if, on contrary, the deceived spouse continues married life without difficulty or repugnance, and in fact goes on to procreate children with the other spouse, then one can presume that he or she was not really tricked into giving consent to marriage". Kennath Boccafola, "Deceit and Induced Error about a Personal Quality", *Monitor Ecclesiasticus* 124 (1999), 707-708.

first[116]. However, it must be borne in mind that the delayed reaction does not constitute a contrary element in considering the case on the ground of *dolus*[117]. There can be situations and circumstances which do not permit the deceived party to interrupt immediately the married relationship at the discovery of *dolus*[118]. In such cases, the judge will

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[116]"In concreto l'accertare che il soggetto tenesse alla presenza o all'assenza di una certa qualità personale nel suo futuro coniuge, nonché il verificare come esso si sia comportato alla scoperta dell'errore sono considerati elementi indiziari della prova di un vero stato di errore e – ancor più precisamente – di un errore determinante, ossia *causam dans* al consenso matrimoniale". Paolo Bianchi, "Esempi di applicazione giurisprudenziale del can. 1098 (dolo): casistica e problemi probatori", *Quaderni di Diritto Ecclesiale* 9 (1996), 375.

[117]Gerard Mckay states that the discovery of the truth of the situation in itself does not always provoke a strong and immediate reaction from the part of the decieved party. He continues: "la prima reazione dell'errante è di natura intellettuale o emotiva, e può essere articolata in diversi momenti: incredulità, confusione, sgomento, disperazione e così via. Molto può dipendere dal carattere e dalla cultura dell'errante. L'errante di fronte alla realtà del suo errore può a volte non saper cosa fare dopo. O può pensare che effettivamente non c'è nulla da fare. Forse richiede tempo per poter assimilare e ponderare le notizie ricevute. È solo in un secondo momento che l'errante passa all'azione. Una reazione decisiva può essere benissimo immediata, appena verificato l'errore compiuto; a volte la parte può aver bisogno di tempo per approfondire la questione e per capire cosa si può o si vuole fare". Gerard Mckay, "Errore sulle qualità della persona, errore dolosamente provocato: le prove", in AA. VV., *La prova della nullità matrimoniale secondo la giurisprudenza della Rota Romana*, (Studi Giuridici 91), 190.

[118]"Etsi haud videatur ruptura proxima cum coniux veritatem detexit, tamen obliviscendum non est, et praecipue hac in provincia, vitam communem multa manifestare, quia omnis casus historiam peculiarem habet et reactiones partis deceptae considerandae sunt una cum consideratione: familiaris, indolis partis deceptae, ambientis socialis professionalisque. Enim accidere potest quod ruptura hic et nunc multis ex causis impossibilis habeatur; quinimmo non insolitum videtur quod pro quodam tempore pars decepta, humaniter agens, perscrutat momentum opportunum ad separationem instaurandam. Quapropter mens vel indolis partis deceptae necnon circumstantiae prae et post nuptiales haud negligendae sunt et magni momenti sunt ad comprobandum assertum dolum". *Coram* Monier, 6 November 1998, in *SRR Dec.*, 90, 713.

"Maximum momentum tribuendum quoque ad modum sese gerendi partis deceptae cum edoct[a] fuit de qualitatis carentia; tamen reactiones partis deceptae considerande sunt una cum aestimatione: familiaris, indolis partis deceptae, ambientis socialis vel artis exercitae. Revera non insolitum videtur quod pro quodam tempore pars decepta, humaniter agens, perscrutat

have to make a thorough examination of the social ambience, family situation, educational qualifications and professional life of the *deceputs* before arriving at the conclusion regarding *reactionis*. In short, we can say that it is possible to give only the general principles regarding the *criterium reactionis* because of the singularity of each marriage nullity case. Each case has to be examined and evaluated individually applying the general principles regarding marriage consent and the defects of marriage consent.

Error can also be deduced from the testimonial and documentary evidence. Mere presence of deceit or error[119] will not suffice according to *CCEO* c. 821 (*CIC* c. 1098). Only a causal relationship between deceit, error and consent results in invalidity[120].

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momentum opportunum ad separationem instaurandam". *Coram* Monier, 26 March 1999, in *SRR Dec.*, 91, 217.

[119]With regard to the relationship between *dolus* and error Boccafola asserts: "[…] it is clear that deceit, by itself, is not an autonomous ground of nullity. The cause of the nullity is the induced or imposed error, *error dolosus*. Therefore, not just the deceit, nor just the error, but only the combination of these two elements, i. e., an error, about a determined personal quality, brought about by fraudulent conduct, causes nullity according to c. 1098. Hence, the *dolus* has to have created real error in one of the contracting parties; if there truly was deceit, but no error, (if, for example, if the other party was not fooled by the deceit into thinking that the prospective spouse was really pregnant by him) then such deceit does not invalidate. The purpose of the canon, after all, is to protect the liberty of the deceived party, who if not really deceived, must be thought to have acted freely". Kenneth Boccafola, "Deceit and Induced Error about a Personal Quality", *Monitor Ecclesiasticus* 124 (1999), 703.

[120]"[...] deceit aimed at obtaining consent must be above all a *dolus causam dans*, not a mere *dolus incidens*, in such a way that there is a clear relationship of cause and effect between the deceit and the consent. This connection can be reasonably and plausibly deduced [...] from the behaviour of the person deceived, immediately after discovering deceit". Giuseppe Sciacca, "Deceit in Recent Rotal Jurisprudence", in P. M Dugan and L. Navarro, (eds.), *Matrimonial Law and Procedure*, 142. While judging a case under the ground of *dolus* the judge will have to verify the strict cause-effect relation between: 1) deceitful action and consent; 2) deceit and error; 3) error and consent, since only the deceit aimed at the attainment of the matrimonial consent is invalidating. "La verifica della susistenza d'un nesso 'finalistico' tra la condotta dolosa ed il consenso matrimoniale [...]; il controllo del nesso dolo-errore, se cioè il dolo abbia effettivamente provocato una *deceptio* [...]; l'accertamento del nesso tra l'errore e la prestazione del consenso matrimoniale". Raffaella Witzel, "La nullità del matrimonio ob dolum (can.

3.3 The Purpose of the Deceitful Behaviour

In cases of *dolus*, proofs serve to verify the subjective intention behind the deceitful action. The explicit intention must be *ad obtinendum consensum,* i.e., to obtain the consent of the other party. *Dolus* for another purpose does not invalidate consent[121]. Additionally, deceit itself does not suffice. Rather, the *dolus* must cause an intended error about a quality capable of disturbing conjugal life[122].

Moral certainty of *dolus* requires a proven intent to deceive a party into consenting to marriage. Otherwise, this ground of nullity cannot be invoked[123]. Relevant proofs are the testimonies of witnesses and the declarations of the parties themselves regarding the deception, as well as the very circumstances of the celebration of the marriage[124].

3.4 Lack of Quality

To have moral certainty of *dolus*, the judge must verify the presence or absence of a personal quality[125]. The quality must belong to the spouse, not to others, and it must deceitfully have been alleged at the moment of matrimonial consent. It must not, therefore, be a *deceptio spei vel expectationis concernentis res futuras*[126]. Given the nature of the matter, it is impossible to list all personal qualities inherently capable of

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1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 111-112.

[121]"Dolus de quo agitur oportet sit patratus ad consensum obtinendum. Necesse ergo omnino est probare dubium motivum patrati doli fuisse praecise consensum matrimonialem elicere. Dolus circa aliquam qualitatem, patratus ob aliud motivum – verecundiam, ex. gratia vel superbiam – non invalidat". *Coram* Burke, 25 October 1990, in *SRR Dec*., 82, 725.

[122]"[…] non basta che via sia malizia di una parte per ravvisare la nullità per dolo, se l'altra parte non cade in errore, ovvero se è caduta in errore, ma non su una qualità che di per sé stessa può perturbare la vita coniugale". Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 113.

[123]Massimo Mingardi, "Fatti circostanziati e qualità personali in relazione all'errore doloso: aspetto dottrinali", *Quaderni di Diritto Ecclesiale* 26 (2013), 492.

[124]*Coram* Civili, 8 November 2000, in *SRR Dec*., 92, 602-608, 608, n. 14.

[125]Naturally, the presence of a negative quality and its concealment will also constitute the *fattispecie* of *dolus*.

[126]Giuseppe Sciacca, "Deceit in Recent Rotal Jurisprudence", in P. M Dugan and L. Navarro, (eds.), *Matrimonial Law and Procedure*, 147.

disturbing the *consortius totius vitae*[127]. Moreover, several methods can prove the absence of a quality: the testimony of the deceived party, corroboration by witnesses (including those of doctors and other qualified witnesses), a confession by the deceptor, and documentary evidence[128].

Such qualities[129] can be viewed both objectively and subjectively[130]. Therefore, in considering the ground of *dolus*, judges should pay

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[127]"Lex elenchum taxativum non sancit, se indubitanter de omnibus qualitatibus agitur, quarum absentia pacificam ac proficuam evolutionem coinugii impedit vel impedire potest, cum vel essentiam vel propretates vel naturalem ordinationem ipsius instituti matrimonialis attingat (cf. cann. 1055-1056). Ad gravitatem perturbationis coniugii statuendam, non solum gravitas obiectiva, quae indubie praevalens est sed etiam gravitas subiectiva, i.e. momentum quod pars decepta tribuit qualitati, perpendenda est. Nam qualitati, quam alter nullius vel parvi momenti habet, alter, attentis peculiari mente, cultura et moribus societatis in qua degit, magnum pondus afferre potest". *Coram* Bruno, 19 November 1993, in *SRR Dec*., 85, 675, n. 4. Analyzing a rotal decision on *dolus* (*coram* Pinto, 28 May 2015) Franceschi makes the following observation, "[…] comunque sia vero che il dolo deve essere grave e deve far riferimento a una qualità grave, non possiamo dire che soltanto il dolo su *determinate* qualità già stabilite renderebbe nullo il consenso matrimoniale. Vi sono delle qualità che, benché in sé stesse e considerate in astratto potrebbero non perturbare gravemente qualsiasi comunità di vita matrimoniale, nel caso concreto, come ho già detto, per la gravità dell'inganno e delle macchinazioni, per il loro contrasto con il concreto progetto matrimoniale, feriscono così gravemente il processo di formazione della volontà di donarsi coniugalmente a una determinata persona, che giustificano pienamente la determinazione di una sanzione di nullità come quella del canone 1098". Héctor Franceschi, "La relazione tra dolo e condizione e la natura della qualità che può perturbare gravemente il consorzio di vita coniugale", *Ius Ecclesiae* 28 (2016), 176-177.

[128]"Il criterio probatorio predominante è quello relativo alla *reactio* del dolo *deceptus*, quale risulta dalla prova diretta, che essentialmente nasce dall'escussione di parte attrice e dalle dichiarazioni dei testimoni. Ad esempio, per quanto riguarda la capacità di generare, qualità che parte attrice sostiene essere mancante nella comparte, le sentenze affermative si basano sulle deposizioni della parte e dei testi, che convincono il Turno circa l'aspettativa dell'attrice di procreare, e sull'immediata sua reazione alla scoperta della infertilità dell'altra parte". Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 118.

[129]For discovering the presence of *dolus* and psychological state of the deceived person, rotal jurisprudence insists the application of three principles to reach moral certainty: a) the importance attributed to a quality by the

attention to both the objective importance and the subjective estimation of a quality[131]. Cultural factors and personal traits of a

party; b) constancy in demanding that quality; c) the behaviour of the deceived party towards the other party when the deception is discovered. "Etenim, detectio doli et status psychicus personae deceptae (qui reddit ipsium deceptum adhuc erroris victimam necnon subiectum condicionis appositae), non imponere nequeunt ut applicentur principia quae iurisprudentia Nostri Fori praescribit ad assequendam moralem certitudinem supra aliorum capitum nullitatis factispeciebus, i. e. iuxta triplex criterium: a) quanti nupturiens fecerit qualitatem; b) quaenam perservantia ab eodem adhibita fuerit in urgendam praetensam qualitatem usque ad nuptias necnon postea; c) modus se gerendi peculiariter cum altera parte qua doli seu deceptionis auctrice, quando primum se invenit ipse deceptus illo bono seu qualitate absolute intenta definitive orbatum existitisse". *Coram* Ragni, 27 April 1993, in *SRR Dec*., 85, 295, n. 9.

[130]According to Raffaella Witzel, "Nel complesso, si può dire che – nella varietà dei giudizi condotti sulla base di una valutazione oggettiva oppure soggettiva della qualità che *suapte natura consortium vitae coniugalis graviter perturbare potest* – appare predominante nella giurisprudenza rotale una posizione moderatamente soggettivistica. Del resto, il ripetuto ricorso nelle sentenze rotali al *criterium reactionis*, con il quale si attribuisce rilevanza probatoria al comportamento del deceptus allorché, dopo il matrimonio, ha scoperto l'inganno, valorizza un aspetto soggettivo che, altrimenti, ove si accedesse alla più rigorosa impostazione oggettivistica, sarebbe praticamente irrilevante". Raffaella Witzel, "La nullità del matrimonio ob dolum (can. 1098) nella giurisprudenza della Rota Romana: aspetti probatori", *Quaderni dello Studio Rotale* 19 (2009), 116-117.

[131]Paolo Bianchi observes that among the rotal decisions there are two lines of interpretation regarding personal qualities that by their very nature can disturb the conjugal life: "quella che considera legittima la sola interpretazione oggettiva e che propone come criterio di misura della attitudine perturbativa il consorzio coniugale nelle sue essenza, finalità e proprietà essenziali" (*coram* Burke, 25 October 1990, in *SRR Dec*., 82, 722-733; *coram* De Lanversin, 17 March 1993, in *SRR Dec*., 85, 151-169; *coram* Burke, 18 July 1996, in *SRR Dec*., 88, 532-543; *coram* Pompedda, 26 July 1996, in *SRR Dec*., 88, 581-586); "quella che ammette una possibile considerazione anche soggettiva, in riferimento sia alle aspettative del soggetto passivo dell'errore doloso, sia dell'ambiente sociale e culturale nel quale la vicenda è storicamente collocata" (*coram* Faltin, 22 July 1991 (not published); *coram* Bruno, 19 November 1993, in *SRR Dec*., 85, 673-682; *coram* Monier, 22 March 1996, in *SRR Dec*., 88, 297-308; *coram* Faltin, 30 October 1996, in *SRR Dec*., 88, 671-679). Paolo Biachi, "l'interpretazione del can. 1098 da parte della giurisprudenza della Rota Romana", in AA. VV, *Errore e dolo nella giurisprudenza della Rota Romana*, (Studi Giuridici 55), 114-115; Fabio Franchetto, 'Fatti circostanziati e qualità personali

person play a vital role in the formation of the subjective estimation of the quality[132].

Conclusion

Every canonical trial aims to ascertain the truth of a petition presented before a competent tribunal. A couple whose marriage has failed have the right to allege its nullity, but not a right to this nullity. The judge must discern the truth from the proofs introduced in the case. Therefore, proofs are vital to a marriage nullity process. The five major ones identified by the Codes of Canon Law are: 1) declarations of the parties; 2) documents; 3) witnesses and testimonies; 4) experts; and 5) presumptions.

To use proofs effectively, the judge must know thorougly the constitutive elements of the ground of nullity in question. Regarding the ground of *dolus*, these elements are: the deceptive will of the *deceptor*, error on the part of the *deceptus*, the purpose of the deceitful behaviour and the lack of quality due to deception. By verifying these elements through different proofs and evaluating the same proofs carefully, the judge will be able to discern with moral certainty whether *dolus* invalidated the marriage.

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in relazione all'errore doloso: riscontri giurisprudenziali", *Quaderni di Diritto Ecclesiale* 27 (2014), 90-127.

[132]With regard to subjective estimation of a quality and its capacity to disturb the *consortium vitae*, the observation made by Mauro Bardi is worth mentioning: "se la *sterilitas* della controparte è generalmente ritenuta perturbante per la maggioranza di coloro che si accingono al matrimonio, è possibile immaginare però che per una piccola parte di nubenti, la stessa incapacità a procreare sia valutata come fattore di pregio od addirittura motivo unico che ha spinto a contrarre. Nello stesso senso, una grave malattia fisica o mentale nella controparte, viene considerata generalmente sgradita e perturbante per il *consortium vitae* una volta scoperta; c'è per contro da tener presente che per il *deceptus* eventualmente affetto dalla medesima malattia, potrebbero risultare indifferenti le condidizioni fisiche dell'altro coniuge, e che egli, avendole conosciute avrebbe egualmente sposato. Per evitare quindi che il can. 1098 si trasformi in un mero strumento di frode messo a disposizione del *deceptus* che colga l'occasione di liberarsi *ad mutum*, di un matrimonio che avrebbe egualmente accettato, si rende necessaria, ad opera del giudicante, una analisi condotta alla luce della mentalità, delle concezioni, del modo di vivere del soggetto che è stato tratto in errore." Mauro Bardi, *Il dolo nel matrimonio canonico*, 227-228.